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Supreme Court of the United States.

October Term 1905.

No. 370
and
No. 594.

FRANKLIN McNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD AND THE GREENSBORO ICE AND COAL COMPANY,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

Cross Appeal in Same Case.

BRIEF OF SOUTHERN RAILWAY COMPANY.

FABIUS H. BUSBEE,
CLAUDIAN B. NORTHROP,
Solicitors for Southern Railway Company.

CONTENTS.

	Pages.	
Statement of Case	1- 16	Inclusive
Specifications of Error on Cross Appeal.	17	
Introduction to Argument Setting Forth Points to be Developed.....	18- 22	"
Authorities Holding this Court will not Disturb Findings of Fact Concurred in by the Master and the Court Below	23	
This is a Controversy Between Citizens of Different States, also One Arising under the Constitution of the United States	24	
Jurisdictional Amount Admitted by Pleadings	24- 26	"
Matter in Dispute Involves Sum or Value Exceeding $2,000, Exclusive of Interest and Costs.....	26- 32	"
This is Not a Suit Against State of North Carolina	33- 40	"
This Bill is Brought to Prevent Irreparable Injury and a Multiplicity of Suits	40- 43	"

	Pages.	
This is Not a Suit to Restrain Cases Already Pending in State Courts Contrary to Section 720, U. S. Revised Statutes	44	
This Suit does not Violate Section 720, U. S. Revised Statutes, Because North Carolina Corporation Commission is not a Court in the Sense of the Federal Statute.....	45- 64	Inclusive
Four Cars of Coal in Question were and are Interstate Commerce and Beyond the Control of North Carolina Corporation Commission	64- 68	"
Rules of N. C. Corporation Commission as to Placing Cars Loaded with Interstate Freight and Orders of N. C. Corporation Commission to Place Four Cars Void as an Interference with Interstate Commerce Because They Deal with a Subject National in its Character and Because Congress has Legislated Already	69- 99	"
Orders of Defendants to Place Said Four Cars of Coal Directly Interfere with Interstate Comerce	99-101	"
Railroads have a Right to Make Reasonable Rules and Regulations for the Conduct of Their Traffic in Their Own Interest and that of the Public .	101-107	"

Pages.

The Right of Management is a Property Right Protected by the Fourteenth Admendment to the Constitution of the United States..... 108-111 Inclusive

Car Service and Storage Rules of Southern Railway Company are Reasonable in Fact ..... 112-114 "

Orders of Defendants are Void and Violate Fourteenth Amendment to the Constitution of the United States Because They Attempt to Dispossess Southern Railway Company of Property upon which it has a Lien for Unpaid Storage or Demurrage..... 115-119 "

Carrier is not Obliged to Deliver Freight at a Mere Switch Track. The Switch of Greensboro Ice and Coal Company was not built under any order of N. C. Corporation Commission or any State Authority, nor was there any Contract Requiring such Delivery..... 119-127 "

Southern Railway Company has Provided Ample Facilities for Unloading Freight at Greensboro, in the Shape of Public Team Tracks and Public Coal Chutes, and can not be Compelled to Deliver at Private Sidings..... 127-130 "

Right to Trade is a Qualified Right and One Trader can not be Compelled by Law to so Conduct his Business as to Insure Profit to Another Trader.... 130-137 "

Proceedings before N. C. Corporation Commission not Due Process of Law. 137-143 "

Pages.

CROSS APPEAL.

Orders of Defendants void because Act Creating N. C. Corporation Commission Confers Legislative, Executive and Judicial Functions Upon the Same Body Contrary to the Constitution of North Carolina and Contrary to the Constitution of the United States.... 143-162 Inclusive

Laws of North Carolina creating the Corporation Commission and Conferring certain powers upon it together with Amendments thereto. Appendix A ..... 163-215 "

Extracts from the Constitution of North Carolina. Appendix A 216

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vs.

SOUTHERN RAILWAY COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

CROSS APPEAL IN SAME CASE.

Statement of Case.

I.

On January 5, 1904, Southern Railway Company filed its Bill of Complaint in the United States Circuit Court for the Eastern District of North Carolina, praying for a perpetual injunction to restrain the Greensboro Ice and Coal Company, Franklin McNeill, Samuel L. Rogers and Eugene C. Bed-

dingfield, from instituting numerous threatened suits to recover damages and penalties from Southern Railway Company for violation of certain void orders of Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, purporting to act as North Carolina Corporation Commission, said orders having attempted to require Southern Railway Company to deliver to Greensboro Ice and Coal Company four cars, loaded with coal, upon the spur track or private siding of Greensboro Ice and Coal Company.

Bill of Complaint, Printed Transcript of Record, pp. 1, 2, 3, 4, 5, 6, 7.

Report of Master, Printed Transcript of Record, p. 63.

Opinion of Court, Printed Transcript of Record, p. 438.

II.

It is alleged in the Bill and found as a fact, both by the Master and the Court, that this is a controversy between citizens of different States, and is also a controversy arising under the Constitution of the United States, and that the matter in dispute in this cause, exclusive of interest and costs, exceeds the sum or value of $2,000.

Bill of Complaint, Printed Transcript of Record, pp. 1, 2, 3, 4, 5, 6, 7.

Report of the Master, Printed Transcript of Record, pp. 63, 64.

Opinion of the Court, Printed Transcript of Record, pp. 438, 439, 447.

Decree of the Court, Printed Transcript of Record, pp. 453, 461, 462.

III.

Said four cars above mentioned were loaded with coal, one at Newcomb, Tennessee, one at Bluefield, West Virginia, one at Pratt, W. Virginia and one at Nanticoke, Pennsylvania. Each and all of said cars of coal, after having been loaded at said points in Pennsylvania, West Virginia and Tennessee, were carried over the lines of Southern Railway Company and its connections as one continuous uninterrupted journey to Greensboro, North Carolina, which point was reached by said cars on October 18, 19, and 22, 1903, respectively. The said cars of coal remained in their original condition after reaching Greensboro, and were not delivered to consignee or unloaded, and the coal remained stored in the original car or package and was not transferred from any of the cars to any warehouse. The shipments, as stated above, in the case of each of said cars constituted one continuous uninterrupted journey from the points of origin in States other than North Carolina to Greensboro, North Carolina, and therefore were, and are, interstate commerce.

Printed Transcript, 239-240.

Bill of Complaint, Printed Transcript of Record, pp. 2, 3.

Admission in Answer of Corporation Commission, Printed Transcript of Record, p. 15.

Report of Master, Printed Transcript of Record, pp. 65, 66.

Opinion of Court, Printed Transcript of Record, p. 448.

Decree of Court, Printed Transcript of Record, p. 455.

IV.

Immediately after said four cars reached Greensboro, Southern Railway Company sent the usual notices to Greensboro Ice and Coal Company, stating that said cars had arrived at Greensboro and were ready to be delivered to said Greensboro Ice and Coal Company upon payment of freight. Notice was also given, in accordance with rules duly published and known to Greensboro Ice and Coal Company at the time of ordering the coal, that unless said cars were unloaded within 72 hours after the date upon which notice was given to Greensboro Ice and Coal Company that the cars were ready to be unloaded, demurrage charges ($1.00 per day for each car) would accrue for using the cars for the purpose of storing coal. Delivery of said cars was tendered Greensboro Ice and Coal Company upon the regular public team tracks of Southern Railway Company at Greensboro, North Carolina, said team tracks being accessible to all parties engaged in business at Greensboro, and the usual place for the delivery of coal and other articles of commerce. The Greensboro Ice and Coal Company declined to unload said cars unless same were placed upon a certain private siding or spur track leading into the private yards of Greensboro Ice and Coal Company, and Greensboro Ice and Coal Company refused to unload said cars within 72 hours subsequent to the notice aforesaid. Demurrage charges therefore accrued upon said cars.

Printed Transcript of Record, p. 216.

Report of Master, Printed Transcript of Record, pp. 67, 68.

Decree of Court, Printed Transcript of Record, pp. 456, 457.

V.

Southern Railway Company has adopted certain rules known as "North Carolina Car Service Association Revised Car Service and Storage Rules." Both the Master and the court have found as a fact that said rules are reasonable, and their object is not to produce revenue, but to facilitate the distribution of equipment and the expeditious handling of freight, and to that end to enforce an equal, reasonable and uniform charge for the detention of cars when the cars are detained over the free time prescribed in the rules; that they have had this effect and have operated and do operate to the mutual benefit of the railroad and the public, and have reduced the average time of detention of cars from five days to one and one-fifth days, and have increased the number of cars available for public service.

Printed Transcript of Record, pp. 215, 216, 217, 218, 219, 220, 221, 222, 223.

Report of Master, Printed Transcript of Record, p. 66.

Opinion of Court, Printed Transcript of Record, p. 441.

Decree of Court, Printed Transcript of Record, p. 455.

VI

In pursuance of said Rules and prior to October 18, 1903, the date upon which the first of said above mentioned four cars reached Greensboro, to-wit: on the 12th day of October, 1903, formal notice had been given by Southern Railway Company to Greensboro Ice and Coal Company that all cars thereafter would be delivered to Greensboro Ice and Coal Company on the public team tracks of Southern Railway Company at Greensboro, North Carolina, said notice reading as follows:

"SOUTHERN RAILWAY COMPANY.

"Office of ————————
"Greensboro, N. C., Oct. 12, 1903.

"GREENSBORO ICE AND COAL COMPANY,
Mr. M. W. Thompson, Manager.

"DEAR SIR: Please take notice that commencing 12:00 noon, Oct. 17, 1903, this company will decline to switch any cars to your private siding, in the yard of your company at Greensboro, N. C., and will only make delivery to you on the public team tracks of this company in the yards at Greensboro, N. C. This action is made necessary by reason of your refusal to comply with car service regulations, declining to pay reasonable charges for the use of cars that have been detained before unloading on your private track above referred to, and that we find it necessary for the protection of our equipment to tender you further deliveries upon tracks where cars may be under our immediate supervision and control.

"Agent, W. E. COFFIN,
"Southern Railway Company."

Part of Exhibit A attached to answer of McNeill, Rogers and Beddingfield.
Printed Transcript of Record, p. 31.

VII.

Hence, when said four cars of coal reached Greensboro, as aforesaid, they were offered and tendered to the Greensboro Ice and Coal Company upon the public team tracks, and Greensboro Ice and Coal Company declined to accept or unload said cars, and the same remained upon the team tracks from October 22, 1903, until November 2, 1903, on which date said cars were moved to Hucomuga Mills siding.

as the cars were interfering with the business of the company and the public, by remaining so long on the team tracks unloaded, because of the refusal of the Greensboro Ice and Coal Company to receive and unload the cars.

The team tracks provided by Southern Railway Company at Greensboro are used by the public generally for unloading freight including coal and are amply sufficient, besides which there are public coal chutes and bins provided by the Railway Company at Greensboro.

Report of Master, Printed Transcript of Record, pp. 67, 72.

Opinion of Court, Printed Transcript of Record, pp. 441, 442, 446.

Decree of Court, Printed Transcript of Record, pp. 456, 460.

VIII.

Meanwhile, Greensboro Ice and Coal Company applied to the defendants, McNeill, Rogers and Beddingfield, purporting to act as North Carolina Corporation Commission and said defendants without notice to Southern Railway Company, issued the following order, dated October 31, 1903:

> "This cause coming on to be heard, upon complaint, and after notice to the defendant and an appearance by them, and it being made to appear to the Commission by the plaintiff that four cars of coal, consigned to the complainant, have been conveyed to Greensboro by the Southern Railway Company and that said cars are now and have been on the yards of said Railway Company for several days, and that the agents of said company were requested by said consignees to place said cars for unloading soon after their arrival on a side track built at the expense of, and by, said complainant and said Railway Company to facilitate the loading and unloading of complainant's freights; and that said consignees offered to pay the freight charges due on said cars of coal if the railway company would

indicate their willingness to place them as requested by consignee; and it further appearing that the said railway company have refused to place the said cars as requested and insist that they will place said cars only on public team tracks; and it further appearing that said cars of coal can be unloaded by consignees in much less time and at much less expense on the track constructed for that purpose than on public team tracks and at no greater expense to the railway company; and it further appearing that the cause assigned by the Southern Railway for its refusal to place cars as requested by consignees is insufficient, namely: that consignee refused to pay certain demurrage charges which the railway company claims accrued on other cars while on public team tracks of said railway company, and which charges the consignees dispute and allege to be unjust. It is, therefore, ordered that the Southern Railway Company upon the payments of the freights due on said cars of coal, and within forty-eight hours after service of this order, place the four cars of coal consigned to the Greensboro Ice and Coal Company on tracks provided by complainant and defendant for the loading and unloading of the freights of the complainant, to the end that the same may be unloaded and the complainant receive their freights.

Signed, "FRANKLIN MCNEILL,
"Chairman."

Printed Transcript of Record, p. 22.

Master's Report, Printed Transcript of Record, pp. 65, 74.

Opinion of Court, Printed Transcript of Record, p. 440.

Decree of Court, Printed Transcript of Record, p. 454.

IX.

Whereupon Southern Railway Company, being advised by counsel, declined to obey said order, on the ground that it was a direct interference with interstate commerce and with the right of Southern Railway Company to manage and control its business in the disposition of its cars and freight in a due and orderly manner in accordance with law, and that said order was calculated to interfere with the expeditious handling of the equipment of Southern Railway Company and its right to manage its affairs and control its internal economies in such manner as to produce the greatest efficiency of service for the benefit of the public. Southern Railway Company then filed exceptions to said order and the same were heard by said defendants, McNeill, Rogers and Beddingfield, and said order of Oct. 31, 1903, was affirmed and continued permanently in force by a ruling of said defendants dated December 10, 1903, whereby all the exceptions of Southern Railway Company to said order were overruled.

Southern Railway Company then appealed to the Circuit Court of Guilford County, North Carolina.

Printed Transcript of Record, pp. 18, 19, 23, 24, 266, 267, 268, 269, 272, 273.

Master's Report, Printed Transcript of Record, p. 75.

Decree of Court, Printed Transcript of Record, p. 461.

X.

Thereafter said Greensboro Ice and Coal Company threatened to bring numerous suits against Southern Railway Company for damages and the recovery of penalties under certain Acts of the Legislature of North Carolina providing for same, and caused its counsel to write a letter dated December 29, 1903, in which it is stated:

"If you should abide by the action of the Corporation Commission and its decision, Mr. Thompson would not feel like prosecuting the railroad company for penalties and bringing an action for punitive damages, as he has the right to do.

"In other words, if he brings such action, it will be because the course pursued by the railroad company makes him feel that he is beyond question justified in asserting his legal rights in these actions. He is not the kind of a man who is on the lookout for a technical violation of a penal statute that he may profit by a suit brought for the penalty, but he is the kind of a man, as your client has probably learned, who, when he feels his rights are ignored and he is forced into a fight, can fight vigorously. Feeling that if he were to bring actions without saying this much to you, his attitude might be misconstrued, he has concluded, after consultation with his counsel, that it would be best to set himself right by addresing this letter to you. Our court comes on the 18th day of January, and we would be glad to have a reply to this in time to have summons served returnable to that term of court, if we desire to do so," thus clearly threatening that unless the Southern Railway Company abandoned its appeal, suits would be entered for the recovery of penalties and damages.

Printed Transcript of Record, p. 118.

Master's Report, Printed Transcript of Record, p. 73.

Opinion of Court, Printed Transcript of Record, p. 446.

XI.

"Though denied in the verified answers" (Opinion of Court, Printed Transcript of Record, pp. 451, 19), said defendants, McNeill, Rogers and Beddingfield, also threatened to bring numerous suits against Southern Railway Company, and it is claimed under the laws of North Carolina that every day's disobedience of an order or ruling of the Commission lays Southern Railway Company open to suits for penalties

amounting to $500 a day for each of the four cars in question, and it is claimed that every day since October 31, 1903, on which Southern Railway Company has declined to obey said order of said Commission, has exposed it to suits for $500 penalties on each and every one of said four cars, besides the threatened suits for accrued damages and penalties on the part of the Greensboro Ice and Coal Company. Thus hundreds of suits were threatened to arise out of this transaction.

Printed Transcript of Record, pp. 19, 117, 263, 303.

Master's Report, Printed Transcript of Record, p. 73.

Opinion of Court, Printed Transcript of Record, pp. 447, 451.

Decree of Court, Printed Transcript of Record, p. 460.

XII.

Greensboro Ice and Coal Company paid the freight on said four cars of coal on October 27, 1903, upon the advice of the North Carolina Corporation Commission, and after the receipt of a letter from said Commission, counseling them to do so, dated October 26, 1903.

Printed Transcript of Record, pp. 44, 264, 299.

Master's Report, Printed Transcript of Record, p. 67.

Opinion of Court, Printed Transcript of Record, p. 442.

Decree of Court, Printed Transcript of Record, p. 456.

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XIII.

On November 2, 1903, Southern Railway Company filed exceptions to the order of the North Carolina Corporation Commission dated October 31, 1903, and same was set for hearing by North Carolina Corporation Commission November 12, 1903.

Notwithstanding that said exceptions were filed on November 2, 1903, and notwithstanding same were set for hearing by North Carolina Corporation Commission for November 12, 1903, and before said exceptions were heard or could be heard, said North Carolina Corporation Commission on November 3, 1903, ~~telegraphed~~ wrote Greensboro Ice and Coal Company informing said Greensboro Ice and Coal Company that it would bring suit for penalties against Southern Railway Company.

Printed Transcript of Record, pp. 18, 19, 23, 24, 263, 303.

XIV.

One of said four cars of coal belonged to Southern Railway Company, two were the property of the Norfolk and Western Railway Company and one was the property of Chesapeake and Ohio Railway Company.

Each foreign car which remains on the lines of another railway company exceeding thirty days subjects the delinquent railway company to a penalty of one dollar per day to the railway company owning said car.

On all of said four cars, except the one belonging to it, Southern Railway Company was obliged to pay the railway company owning said cars a per diem of twenty cents per day for each day that said cars remained on its lines after the expiration of the first three days that said cars remained

on the rails of Southern Railway Company, and for each day said three foreign cars belonging, respectively, to Norfolk and Western Railway Company and Chesapeake and Ohio Railway Company were on the rails of Southern Railway Company, exceeding three days from the time they were received, a per diem of twenty cents per car was paid by Southern Railway Company on said cars.

Master's Report, Printed Transcript of Record, p. 65.

Opinion of Court, Printed Transcript of Record, p. 440.

Decree of Court, Printed Transcript of Record, p. 454.

XV.

That there was no written or expressed contract on the part of Southern Railway Company in respect to the use of the private siding or spur track running into the yards of Greensboro Ice and Coal Company, but there was an implied agreement that said track should be adopted and treated, so far as Greensboro Ice and Coal Company was concerned, as a track for the delivery of its cars upon its trestle, under the reasonable rules and regulations of Southern Railway Company, this implied agreement to remain in effect so long as said track was maintained by mutual consent, terminable at the will and option of Southern Railway Company or Greensboro Ice and Coal Company.

Master's Report, Printed Transcript of Record, p. 70.

Opinion of Court, Printed Transcript of Record, p. 444.

Decree of Court, Printed Transcript of Record, p. 458.

XVI.

The extension from the railway's right of way to the yard of the Greensboro Ice and Coal Company passes over land belonging to W. D. McAdoo and the Guilford Rolling Mills, and neither Southern Railway Company nor Greensboro Ice and Coal Company has any legal right to use the same, there being no written grant of easement or license, the Greensboro Ice and Coal Company having only the right, under its lease from McAdoo, to ingress and egress for ordinary vehicles.

The use of said land has been by sufferance only, and the owners have made no objection and taken no steps to prevent said use, but once or twice the Secretary of said Guilford Rolling Mills has complained of it as a nuisance, and McAdoo was threatened to have compensation made him.

Master's Report, Printed Transcript of Record, p. 69.

Opinion of Court, Printed Transcript of Record, p. 443.

Decree of Court, Printed Transcript of Record, p. 458.

XVII.

Much testimony was introduced by defendants as to thirteen cars of coal which arrived at Greensboro between September 9, 1903, and September 19, 1903. The testimony shows that one of said cars arrived in Greensboro on the 9th of September and two of them arrived on the 10th of September, the balance, or ten, thereof, arriving at Greensboro between the 14th and the 19th of September, 1903.

On the 14th of September, 1903, the spur track was spiked down by the directions of Southern Railway Company because it was undergoing repairs and was being shifted, at the

instance of Greensboro Ice and Coal Company, some ten or twelve feet, and the entire track was torn up in the yard of the Coal Company and a trestle was being constructed, lifting the track.

From the 14th of September to the 29th of September, 1903, both the court and the Master held that it would have been contrary to the public safety to have used said spur or side track.

During this period Greensboro Ice and Coal Company declined to unload cars which were arriving on the yards, at any other point except upon that part of the spur track lying between their fence and the rim of the right of way of Southern Railway Company; consequently, while Southern Railway Company was ready to deliver said cars on its public team tracks, Greensboro Ice and Coal Company failed and refused to unload said cars on the public team tracks and they were detained and demurrage accrued thereon.

All of said testimony was ruled out by the court at the final hearing as being irrelevant to the issues involved, but the court and the Master both held that it would have been unsafe to use the spur track while it was undergoing repairs and Greenboro Ice and Coal Company should have made provision to unload elsewhere.

Printed Transcript of Record, pp. 72, 190, 445, 446, 447, 460, 461.

XVIII.

On October 31, 1903 Southern Railway Company wrote the following letter to Greensboro Ice and Coal Company:

"GREENSBORO, N. C., Oct. 31, 1903.

Greensboro Ice and Coal Co.,
Greensboro, N. C.

GENTLEMEN: Referring to your letter of Oct. 27th asking that we place certain cars on your private sidings. We are not prepared to comply with your request so far as placing in your private yard is concerned, but we can offer you these cars upon our team tracks, and we will place them promptly upon your order to that effect, independent of the old account for car service, upon payment of the car service, which has accumulated on each of these cars since tendered to you upon team tracks, and which you decline to accept.

I attach statement of car service up to the night of Oct. 31st, that is now due upon cars in our yard for you.

Yours truly,
W. E. COFFIN, Agent"

Exhibit to Answer of McNeill, Rogers and Beddingfield, Printed Transcript of Record, p. 31.

XIX.

As heretofore stated, a bill for injunction was filed January 5, 1904, and answers were filed by defendants, and the case referred to a Master; testimony was taken; the Master reported and his report was confirmed by the court, and a decree ordering a perpetual injunction was entered April 10, 1905, and from this decree defendants appealed to this court and a cross appeal on certain points has been taken by complainant.

Specification of the Errors Relied Upon on the Cross Appeal.

1.

That the court erred in not holding that the orders of the Corporation Commission of North Carolina, dated October 31, 1903, and December 10, 1903, directing Southern Railway Company to place four cars of coal upon the private siding or trestle of the Greensboro Ice and Coal Company at Greensboro, North Carolina, were void on the ground that said orders were made by the North Carolina Corporation Commission, a body purporting to exercise legislative, executive and judicial functions, contrary to the Constitution of North Carolina and contrary to the Constitution of the United States, both of which constitutions prescribe that legislative, executive and judicial functions should be forever separate.

2.

Because the court erred in not holding and in not decreeing that the Act of the General Assembly of the State of North Carolina entitled "An Act to establish the North Carolina Corporation Commission," Public Acts, North Carolina, 1899, Chap. 164, is, with its amendments, unconstitutional and void because said Act and its amendments purport to create North Carolina Corporation Commissioners a "Court of Record" and also to clothe the "Court of Record" with legislative and executive functions in violation of the Constitution of the State of North Carolina and in violation of the Constitution of the United States.

Argument.

XX.

The points to be developed in this Argument will be dealt with in the following order:

ONE.

That all the material facts having been concurred in both by the Master and the court below, such findings will be held conclusive by this court.

(Section XX-A p. 23.)

TWO.

Certain questions as to the jurisdiction of the court below and the equities of the bill.

Said questions are as follows:

(1) That this is a suit between citizens of different States, and also involves questions arising under the Constitution of the United States.

(Section XX-B p. 24.)

(2) That the jurisdictional amount is admitted by the pleadings.

(Section XX-C pp. 24-26.)

(3) That the matter in dispute in fact exceeds the sum or value of $2,000 exclusive of interest and costs.

The right of Southern Railway Company to conduct and manage its Interstate business at Greensboro, North Carolina, and to make reasonable rules and regulations for the government thereof is involved in this suit, and the right of defendants to control interstate commerce by State laws instead of the Commerce Act is involved;

and the value of the right of Greensboro Ice and Coal Company to have cars switched upon its private siding irrespective of the reasonable rules of Southern Railway Company is involved.

(Section XX-D pp. 26-32.)

(4) That this is not a suit against the State of North Carolina, but a suit to restrain trespass on the part of defendants purporting to act under an unconstitutional State law.

(Section XX-E pp. 33-40.)

(5) That this bill is brought to prevent irreparable injury and a multiplicity of threatened suits for penalties and damages, wherein Southern Railway Company has a common defense consisting of questions of law common to all of said suits.

(Section XX-F pp. 40-43.)

(6) That this is not a suit to restrain cases already pending in the State courts, contrary to Section 720 of the Revised Statutes of the United States, but is, on the contrary, a Bill to restrain suits threatened to be brought, but which have not been actually instituted.

(Section XX-G p. 44.)

(7) That this suit does not violate Section 720 of the Revised Statutes of the United States, because North Carolina Corporation Commission is not a "court" in the sense of the Federal Statute.

It has no power to execute its own decrees. It is not "a place wherein justice is judicially administered." "To administer justice judicially two parties to a controversy must exist."

There must be an actor or plaintiff, a reus or defendant and a judex or judge, to constitute a court.

"Without a "court" there can be no "suit."

(Section XX-H pp. 45-64.)

THREE.

Questions pertaining to the merits.

(1) The four cars of coal in question were and are Interstate Commerce and beyond the control of North Carolina Corporation Commission.

(Section XXI pp. 64-68.)

(2) Rules of North Carolina Corporation Commission as to placing cars loaded with interstate freight, and orders of North Carolina Corporation Commission to place the four cars of interstate freight now in question, are void because same interfere with interstate commerce.

The storage, handling and delivery of interstate freight is national in its character, and the non-action of Congress is a declaration that this subject shall remain wholly free from State regulation.

Furthermore, Congress has passed a statute which exclusively occupies the field and all State regulations must give way before the Act to Regulate Commerce and its amendments.

(Section XXII pp. 69-99.)

(3) The orders of defendants to deliver said four cars of coal upon the private siding of Greensboro Ice and Coal Company directly interfere with interstate commerce as found by the court below, because they actually lay hands upon the cars, wrest the control of same from Southern Railway Company and amount to a trespass.

(Section XXIII pp. 99-101.)

(4) Railroads have the right to make reasonable rules and regulations for the conduct of their traffic in their own interest and that of the public.

(Section XXIV pp. 101-107.)

(5) The right of management is a property right, in which railways are protected by the Fourteenth Amendment to the Constitution of the United States.

(Section XXV pp. 108-111.)

(6) Car service and storage rules of Southern Railway Company are reasonable in fact, and have been so found by the Master and the court below in this case, and identical rules have been pronounced reasonable by the highest courts in nearly every State in the Union.

(Section XXVI pp. 112-114.)

(7) The orders of defendants requiring the placing of the four cars of coal in question are void and violate the Fourteenth Amendment to the Constitution of the United States, because they attempt to dispossess Southern Railway Company of property upon which it has a lien for unpaid storage or demurrage.

(Section XXVII pp. 115-119.)

(8) A carrier is not obliged to receive or deliver freight on a mere switch track. The private siding or switch track of Greensboro Ice and Coal Company was not built under any order of North Carolina Corporation Commission or any state authority, nor was there any contract between Southern Railway Company and Greensboro Ice and Coal Company requiring the delivery of cars in question.

(Section XXVIII pp. 119-127.)

(9) Southern Railway Company has provided ample facilities for unloading freight at Greensboro in the shape of public team tracks and public coal chutes and can not be compelled to deliver at private sidings.

(Section XXIX pp. 127-130.)

(10) The right to trade is a qualified right and one trader can not be forced by law to conduct his business so as to insure profit to another trader.

A Railway Company is a mere trader subject to general governmental regulation to insure the safety, health, and convenience, of the public, and to prevent oppressive or extortionate charges, but its property can not be taken by the State without just compensation, nor can the use of it be given by the State to the public or another trader without just compensation.

(Section XXX pp. 130-137.)

(11) Proceedings before the North Carolina Corporation Commission were not due process of law under the Fourteenth Amendment to the Constitution of the United States, in that the order of October 31, 1903, made by North Carolina Corporation Commission was without a hearing.

(Section XXXI pp. 137-143.)

FOUR.

CROSS APPEAL.

The orders of defendants requiring said four cars to be placed are void because the Act creating North Carolina Corporation Commission and its amendments, confer legislative, executive and judicial functions upon the same body with reference to the same matter, contrary to the Constitution of North Carolina as well as the Constitution of the United States, and the provisions of said Acts are so inextricably interwoven that the valid parts of the statutes, if there be any, can not be separated from the invalid parts of the statutes, and the whole must fall to the ground.

An invalid law is no law and creates no office.

(Section XXXII pp. 143-162.)

XX—A.

In stating the case, references were made to the pages of the Transcript showing that both the Circuit Court and the Master concurred in their findings of fact and conclusions on all material questions.

It has been conclusively settled by this court that where the Master and the court both concur this court will not disturb the findings, and in the language of Mr. Justice Brown "so far as there is any testimony consistent with the finding, it must be treated as unassailable."

Davis vs. Schwartz, 155 U. S., 636.
Wiscart vs. D'Auchy, 3 Dall., 321.
Bond vs. Brown, 12 How., 254.
Graham vs. Bayne, 18 How., 60-62.
Norris vs. Jackson, 9 Wall., 125.
Ins. Co. vs. Folsom, 18 Wall., 237-249.
The Abbotsford, 98 U. S., 440.
Crawford vs. Neal, 144 U. S., 585.
Turner vs. Ferris, 145 U. S., 132.
Evans vs. State Bank, 141 U. S., 107.
Kimberly vs. Arms, 129 U. S., 512.
Morewood vs. Enequist, 23 How., 491.
The Ship Marcellus, 1 Black, 414-417.
Dravo vs. Fabel, 132 U. S., 487-490.
Companie de Navigacion vs. Brauer, 168 U. S., 104-123.
The Richmond, 103 U. S., 540.
The Conqueror, 166 U. S., 110-136.
Stuart vs. Hayden, 169 U. S., 14.
Baker vs. Cummings, 169 U. S., 198.

XX—B.

We have seen in Section II of the Statement of the Case that this is a suit between citizens of different States and the necessary diversity of citizenship exists, all of defendants being citizens and residents of a different State from that of which the complainant is a citizen and resident.

There are also questions arising under the Constitution of the United States.

XX—C.

Jurisdictional Amount Admitted by Pleadings.

Section 1 of the bill of complaint *inter alia* alleges:

> "That the subject matter of this suit now brought before this Honorable Court is a controversy between citizens of different States, and that the amount involved therein, exclusive of interest and costs, exceeds the sum or value of $2.000."
>
> Printed Transcript of Record, p. 2.

The Bill also sets forth that Southern Railway Company's right to conduct and manage its business under its reasonable rules and regulations is involved, and that this right is of incalculable value.

Bill of Complaint, Section 13, Printed Transcript of Record, p. 6.

That the amount of matter in dispute exceeds the sum or value of $2,000, exclusive of interest and costs, is thus sufficiently and properly alleged.

This Court has said:

"First, then, does the record disclose that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. The allegation in the complaint is "that the amount in dispute in this cause exceeds, exclusive of interest and costs, the sum of $2,000;" and it is also made to appear that the matter in dispute is the title to a mining claim, for which, and for damages and expenses amounting to $1,300, the plaintiff demands judgment. The defendants did not think fit to traverse these allegations, but moved to dismiss on the face of the complaint. Upon such a motion, as upon a demurrer, a court will not incline to dismiss for want of jurisdiction unless the facts appearing of record create a legal certainty of that conclusion. Barry vs. Edmunds, 116 U. S. 550, 29 L. Ed. 729, Sup. Ct. Rep. 501; Wetmore vs. Rymer, 169 U. S. 115, 42 L. Ed. 682, 18 Sup. Ct. Rep. 293. We are not impressed by the criticism that the *amount,* instead of the *matter,* in dispute, is alleged to have exceeded $2,000. The meaning of such an allegation is clear, and in the absence of any traverse thereof, and of any pretense that, in point of fact, the matter in dispute did not exceed the sum or value of $2,000, we think that the record fairly imports the necessary jurisdictional amount."

Blackburn vs. Portland Mining Gold Co., 175 U. S. 570, 574, 44L. Ed. 276, 278.

In the case of Butchers' & Drovers' Stock Yards Co. vs. Louisville & N. R. Co., 67 F. R., 35, the Circuit Court of Appeals for the Sixth Circuit, in an opinion announced by Judge Taft, held:

"But it is said that the averment to the jurisdictional amount is denied by the answer, and is not sustained by any proof. It was decided in Wickliffe vs. Owings, 17 How., 47, that where a bill in chancery avers that the defendant is a citizen of another State, this averment

can only be impugned in a special plea to the jurisdiction of the court, and that the answer is not a proper place for it, under the thirty-third equity rule governing the practice in the federal courts. By pleading to the merits, the defendant admits the averments in the bill which state facts sufficient to establish the jurisdiction of the court. Sheppard vs. Graves 14., How., 505; De Sorby vs. Nicholson, 3 Wall., 420."

67 F. R., 35-40 (C. C. A.)
14 How., 505.
17 How., 47.
3 Wall., 420.

The question of jurisdiction, not having been raised in the case at bar by any special plea to the jurisdiction, it must be held under the rulings of this court that the facts sufficient to establish the jurisdiction are admitted when properly averred in the bill, as in the case here.

XX—D.

Matter In Dispute Involves a Sum or Value Exceeding $2,000 Exclusive of Interest and Costs.

Both the Master and the Circuit Judge have held that this suit involves the right of Southern Railway Company to conduct and manage its interstate business at Greensboro, North Carolina, and to dispose of its rolling stock, and to distribute it, and to refuse or permit its cars to be placed on private sidings, according to its reasonable rules and regulations, and that said right is of incalculable value

to Southern Railway Compay, and amounts to many thousands of dollars far in excess of the sum or value of $2,000 exclusive of interest and costs.

Report of Master, Printed Transcript of Record, p. 63.

Opinion of the Court, Printed Transcript of Record, pp. 438, 439.

Decree of Court, Printed Transcript of Record, p. 453.

Notwithstanding this fact, appellants, in six of their Assignments of Error, repeatedly assert that the jurisdictional amount is not involved in this case, and that the only matter in dispute is the non-payment of $146.00.

Assignments of Errors Nos. 1, 2, 3, 6, 10, 11.

Printed Transcript of Record pp. 467, 468, 469, 470, 471.

The court has expressly held in its decree, as a fact, that:

"The matter in dispute in this cause, exclusive of interest and costs, exceeds the sum or value of $2,000."

Printed Transcript of Record, p. 453.

In its opinion the court below also says:

"The $146 demurrage is not the question at issue in this cause. It may have been the origin of the litigation, but illustrates the truism 'that large oaks from little acorns grow.' This was a suit to restrain threatened irreparable wrong, and a multiplicity of suits for the penalties under the North Carolina statutes for non-compliance to the orders of the corporation commission. These penalties are matters of statute, $500.00 per day, and involve much more than two thousand dollars, if suit should be entered against the complainant for every day it has refused to obey the orders of the corporation commission made herein, and recognize its right to interfere with interstate commerce."

Printed Transcript of Record, p. 447.

Furthermore, the Master and the court both held, as a matter of fact, that the right of Greensboro Ice and Coal Company to have cars transferred and switched upon its private siding or spur track, irrespective of the rules and regulations of Southern Railway Company, was and is involved in this suit, and that the Greensboro Ice and Coal Company receives at Greensboro, North Carolina, from 200 to 365 cars per year, and that it pays out freight in the neighborhood of $15,000 per annum, and that it could not profitably conduct its business without the use of its private siding.

Report of the Master, Printed Transcript of Record, pp. 63, 64.

Opinion of the Court, Printed Transcript of Record, pp. 438, 439.

Decree of Court, Printed Transcript of Record, pp. 453, 454.

The following admission is made in Section 12 of the Answer of the North Carolina Corporation Commission to the Bill of Complaint:

> "These defendants are advised that the orders made by them hereinbefore referred to do not constitute an interference with interstate commerce as alleged in said paragraph 12; *nor with the right of the complainant to conduct its business according to its reasonable rules and regulations except so far as the corporation commission has the right and power to control its rules and regulations by virtue of said act creating the corporation commission, and the amendment thereto contained in chapter 342, Public Laws 1903, whereby the power is expressly conferred upon the North Carolina Corporation Commission by sub-section 26, 'to make rules governing railroad companies in the placing of cars for loading and unloading, and in fixing time limit for the delivery of freights after the same have been received by the transportation companies for shipment.'*

And these defendants further say that, having full power to provide for placing cars for unloading, and in conformity with the rules of the said North Carolina Corporation Commission, the orders complained of in the bill were in strict conformity to the law, and finally adjudged and made after the complainant company had full opportunity to make defense as to its alleged rights in the premises." (Italics ours).

Printed Transcript of Record, p. 20.

From all of the foregoing it is clear that the amount or matter in dispute in this controversy exceeds the sum of $2,000, exclusive of interest and costs, and that the question is squarely raised as to whether the placing of cars, engaged in interstate commerce, for loading and unloading, and the fixing of a time limit for the delivery of interstate freights, shall be governed and controlled by rules made by the Corporation Commission of North Carolina under a State law, or whether the reasonable rules of Southern Railway Company and the Act to Regulate Commerce passed by Congress shall govern.

The case of Butchers and Drovers Stock Yards Co. vs. L. & N. Railroad Co., 67 F. R., p. 35, decided by United States Circuit Court of Appeals for the Sixth Circuit, is directly in point.

It was there held that the value of the right to have and use a spur track and to have carload lots of freight received and delivered thereon, constituted the amount in controversy, and the allegation that the same exceeded the sum of $2,000 was sufficient. In that case an injunction was asked by the company desiring the spur track and it was refused by the railroad company. The court said:

"The damage done by the refusal is to be estimated by the value of the right denied, and therefore the allegation that the damage largely exceeds $2,000 is inferentially a statement that the value of the right denied is largely in excess of $2,000."

67 F. R., 40.

In the case of Nashville, C. & St. L. Ry. Co. vs. McConnell, 82 F. R., 65, it was held:

> "In a suit for an injunction the amount in dispute, for jurisdictional purposes, is not determined by the amount which the complainant might recover from defendant in an action at law for the acts complained of, but by the value of the right to be protected, or the extent of the injury to be prevented by the injunction."
>
> 82 F. R., 65.

In the same case it was further held:

> "The right to carry on a lawful business without obstruction is a property right and its protection is a proper object for the granting of an injunction when the ordinary remedies are inadequate."
>
> 82 F. R., 65.

In the case of Scott vs. Donald, 165 U. S., 107 (41 L. Ed., 648), the Supreme Court of the United States held that the right of doing business, to-wit: the importation of ales, wines and other liquors into South Carolina, having been alleged in the bill for injunction to exceed the value of $2,000, the jurisdictional amount was sufficient, as the value of the right involved was the amount in controversy. The court further said, at page 115:

> "Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property, to an amount exceeding in value $2,000, has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail."
>
> 165 U. S., 107, 115.

The Circuit Court of Appeals for the Fifth Circuit says:

> "In a suit by a railroad company for injunction to restrain a shipper from prosecuting in a State court a multiplicity of suits for overcharge in freight, the maintenance of the scheduled rate under which the charges were made is the real subject of dispute, and the value of such maintenance determines the jurisdictional amount of the controversy. Where such value is not liquidated or fixed by law, the alleged value is conclusive on demurrer to the bill. * * * A railroad company which is threatened with separate suits under the Texas law before a justice of the peace for every carload as to which overcharge is alleged, has no adequate remedy at law, and may obtain an injunction to restrain the prosecution of such suits. Railroad Co. vs. Dowe, 7 S. W. Rep., 368, 70 Tex., 5, followed."
>
> Texas & P. Ry. Co. vs. Kuteman, 54 F. R., 547, 548.

Again, the Circuit Court of Appeals for the Fifth Circuit says:

> "In a suit by a railroad company in a federal court against a number of landowners to enjoin threatened interference with its use of its right of way through their lands, the value of the right of way sought to be protected, and not the value of the land constituting the right of way across the lands of defendants, constitutes the value in controversy for jurisdictional purposes."
>
> Louisville & N. R. Co. vs. Smith et al. 128 F. R., 1.

From the foregoing cases it is clearly established that the amount involved in this controversy exceeds the sum of $2,000, as alleged in the bill, for the said amount is the value of the right of Southern Railway Company to conduct its interstate business under its reasonable rules and regulations, and the value of the amount in controversy

is also the right in dispute between Southern Railway Company and Greensboro Ice and Coal Company, as to whether or not Southern Railway Company is obliged to place its cars on the private spur or siding of Greensboro Ice and Coal Company, regardless of the reasonable rules and regulations of Southern Railway Company; and not upon public team tracks, provided by Southern Railway Company.

And the value of the amount in controversy is also the right in dispute between Southern Railway Company and North Carolina Corporation Commission as to whether or not the latter may lawfully supersede the reasonable rules and regulations of Southern Railway Company as to the delivery of interstate freight, the placing of cars, and the distribution of rolling stock engaged in interstate commerce, and substitute for said reasonable rules and regulations of Southern Railway Company, the rules, regulations and orders of North Carolina Corporation Commission, and thereby govern and control said interstate commerce.

That is to say, the right of Southern Railway Company to manage its business, and control the disposition and distribution of its rolling stock for the best interests of the public, and its own best interests, at Greensboro, North Carolina, is involved; and this right is alleged to be, and is, of incalculable value, far exceeding $2,000, exclusive of interests and costs; and both the Master and the court have expressly so found.

XX-E.

This is Not a Suit Against the State of North Carolina.

It was argued below and will probably be argued here on behalf of defendants McNeill, Rogers and Beddingfield that this is a suit against the State of North Carolina.

In the case of Scott vs. Donald, 165 U. S., 107 (41 L. Ed., 648), it was decided that a bill to restrain the executive officers of a State, under alleged authority of an unconstitutional statute, is not a suit against the State. At page 112, the court says:

> "The objections to proceedings against State officers by injunction are that it is, in effect, proceeding against the State itself, and that it interferes with the official discretion vested in the officers. The answer to such objections is found in a long line of decisions of this Court. Osborn vs. Bank of U. S., 22 U. S., 9 Wheat., 738 (6:204); Dodge vs. Woolsey, 59 U. S., 18 How., 331 (15:401); Louisiana Board of Liquidation vs. McComb, 92, U. S., 531 (23:623); Cummings vs. Merchants Nat. Bank, 101 U. S., 153 (25:903); Memphis & L. R. R. Co. vs. Berry, 112 U. S., 609 (28:837); Poindexter vs. Greenhow (Va. Coupon Cases) 114 U. S., 295 (29:194); Allen vs. Baltimore & O. R. Co., 114 U. S., 315 (29:201); Pennoyer vs. McConnaughy, 140 U. S., 1 (35:363); Belknap vs. Schild, 161 U. S. 10, at p. 18 (40:599, at p. 602)."

These authorities are conclusive as to the defendants McNeill, Rogers and Beddingfield, inasmuch as Southern Railway Company claims that their said order dated October 31, 1903, actually attempted to control, direct and take possession of four cars of interstate coal, thereby committing a trespass upon the property belonging to, or under the control of, Southern Railway Company, and was, and is,

an unconstitutional interference with interstate commerce, and that the Act of the General Assembly of North Carolina under which they purported to proceed is also unconstitutional for other reasons which will be set forth in a subsequent portion of this argument.

These defendants, although they may be acting, or claiming to act, under color of official authority, may be enjoined and restrained from exercising it, and a suit to restrain them from the perpetration of this wrongful act is not an action against the State within the constitutional prohibition, as expounded by the Supreme Court in numerous cases.

The familiarity of this court with the decisions upon this question makes it unnecessary to enlarge this brief by the citation of all the cases in which they were rendered. At first it was held by Chief Justice Marshall that, in order to bring a case within the constitutional provision, the State must actually be a party on the record, but in process of time this construction has come to be considered as too narrow, and now it is settled that the question, whether a suit against a State official is or is not a suit against the State itself, depends not at all upon the parties named in the record, but upon the nature of the wrong complained of, and the character and extent of the relief sought.

A review of the decisions, in which this question has been discussed, would show that, in all the cases where the jurisdiction was defeated, on the ground that such a suit was against the State, the right asserted by the plaintiff was based upon some contract or obligation of the State, express or implied, and that the object of the action, or of the proceeding, out of which the litigation arose, was to collect, or to enfore the recognition and payment directly or indirectly of, a debt or demand alleged to be due from the State. They were suits not merely for the purpose of preventing the officials or agents of the State

from doing wrongful acts, but directly or indirectly they sought to compel them to do some act which would carry out an alleged obligation of the State or to refrain from doing some act which would prevent the performance of some obligation of the State.

The cases of Louisiana vs. Jumel and Elliott vs. Wiltz (107 U. S., 711), were suits upon certain coupons issued by the State of Louisiana; and the case of Louisiana ex rel. Guaranty Co. vs. Steele (134 U. S., 20) was a suit to compel the Auditor of the State to levy a tax to pay certain coupons.

Hagood vs. Southern (117 U. S., 52) was an action to compel county treasurers to receive revenue bond scrip issued by the State and made receivable in payment of taxes.

Hans vs. Louisiana (134 U. S., 1) was a suit on coupons attached to State bonds.

North Carolina vs. Temple (134 U. S., 22) was an action to compel the State Auditor to levy a tax to pay coupons on State bonds.

Christian vs. A. & N. C. R. R. (133 U. S., 233) was an attempt to collect coupons upon certain State bonds issued by the State, by means of a sale of the State's share of stock in the railroad company.

Cunningham vs. Macon & B. R. R. Co., Colquitt and Others (109 U. S., 446) was brought to enforce the State's liability as endorser of certain railroad bonds; and the case of *in re* Ayers (123 U. S., 443) was a proceeding by habeas corpus to release a State officer imprisoned for contempt committed by violating an injunction, restraining him from bringing suit against a taxpayer who had tendered coupons in payment of State tax.

The object of the action last cited was to compel the State of Virginia to perform its alleged obligation, by receiving coupons, when tendered in payment of taxes, with-

out requiring the taxpayer to make certain proof which had been required by a statute of the State passed after the issue of the bonds to which the coupons were attached.

The case of Fitts vs. McGhee, 172 U. S., 516, was relied upon by defendants in the court below but is clearly distinguishable from the case at bar. In that case an injunction was sought against the defendants Fitts and Carmichael, holding, respectively, the offices of Attorney General of Alabama and Solicitor of the Eleventh Judicial Circuit of that State, restraining them from instituting or prosecuting any indictment or criminal proceeding against any one for violating the provisions of a certain Act of Alabama, prescribing certain maximum rates of toll on a bridge across the Tennessee River.

This court held that the injunction would not lie for the reason that the validity of the Act could not be boldly raised in a suit for an injunction merely upon an allegation that the Act was unconstitutional. This court pointed out that the officials sought to be enjoined were not expressly directed to see to its enforcement, nor did they hold "any special relation to the particular statute." This court however was careful to use the following language:

> "If the individual defendants held possession or were about to take possession of, or to commit any trespass upon any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession, by simply asserting that they held or were entitled to hold the property in their capacity as officers of the State. In the case supposed they would be compelled to make good the State's claim to the property, and could not shield themselves against suit because of their official character."
>
> 172 U. S., 529.

This court at the same page then goes on to review many cases in which injunctions have been sustained against State officers such, for instance, as the case of Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362; Scott vs. Donald, 165 U. S., 58; Smyth vs. Ames, 169 U. S., 466, and expressly takes pains to point out that in that class of cases:

> "Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State."
> 172 U. S., 529-530.

In view of the fact that defendants, McNeill, Rogers and Beddingfield, are specially clothed with power and directed to enforce and execute the North Carolina statute now in question, and in view of the fact that said McNeill, Rogers and Beddingfield have actually committed a trespass in issuing an order seizing and taking control of four cars of interstate coal belonging to or under the control of, Southern Railway Company, the case of Fitts vs. McGhee, instead of being an authority for the defendants is a direct authority in favor of sustaining the injunction in the case at bar.

The cases of the class in which it has been held that actions against State officials, to restrain them from the commission of wrongful acts, to the prejudice of the plaintiffs' rights, are not suits against the State, are quite numerous and seem to cover the entire ground in controversy in this case.

In Osborne vs. Bank (9 Wheat., 738), which was the first case upon this subject, Chief Justice Marshall said (at p. 842):

> "The objection is that, as the real party can not be brought before the court, a suit can not be sustained against the agents of that party; and cases have been cited to show that a Court of Chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true, where it is in the power of the plaintiff to make them parties; but if the person who is the real principal—the person who is the true source of the mischief, by whose power and for whose advantage it is done—be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the law could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."
> 9 wheat, 738, 842.

In Davis vs. Gray (83 U. S., 203), which was an injunction against the Governor of Texas and Commissioner of the Land Office to restrain them from incumbering, by patents to others, lands which had been contracted to a railroad company, the court said (at p. 220):

> "Where the State is concerned, the State should be made a party, if it could be done. That it can not be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects, as if the State were a party to the record."
> 83 U. S. 203, 220.

In Pennoyer et al. vs. McConnaughy (140 U. S., 1), which was an action against the Governor, Secretary of State and Treasurer of the State, Mr. Justice Lamar, who delivered the opinion of the court, reviewed all the prior decisions, and in conclusion said (at p. 16):

> "The dividing line between the cases to which we have referred, and the class of cases in which it has been held that the State is a party defendant, and, therefore, not suable by virtue of the inhibtion contained in the Eleventh Amendment to the Constitution, was adverted to in Cunningham vs. Macon & B. R. Co., where it was said, referring to the case of Davis vs. Gray, *supra;* 'Nor was there in that case any affirmative relief granted by ordering the Governor and Land Commissioner to perform any act towards perfecting the title of the Company'—thus holding by implication at least, that affirmative relief would not be granted against a State officer by ordering him to do and perform acts forbidden by the law of his State, even though such law might be unconstitutional."
>
> 140 U. S. 1, 16.

In Hans vs. Louisiana (134 U. S., 1) the general rule on the subject was thus stated by Mr. Justice Bradley:

> "To avoid misapprehension it may be proper to add that although the obligations of a State rest for their performance upon its honor and good faith, and can not be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into Court, yet where property or rights are enjoyed under a grant or contract made by a State they can not wantonly be invaded. Whilst the State can not be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment."
>
> 134 U. S. 1.

We refer the court also to the following cases:

Board of Liquidation vs. McComb, 92 U. S., 531.
Virginia Coupon Cases, 114 U. S., 269.
United States vs. Lee, 106 U. S., 196.
Williams vs. U. S., 138, U. S., 514.
The Siren, 7 Wall., 152.
Ex parte Tyler, 149 U. S., 164.
Cummings vs. Merchants' National Bank, 101 U. S., 153.
Dodge vs. Woolsey, 59 U. S., 331.
Reagan vs. Farmers' Loan & Trust Company, 154 U. S., 362 and
Scott vs. Donald, 165 U. S., 107.
Tingle etc., vs. Welsey, decided by the Supreme Court of the United States, May 10, 1897, (167 U. S., 204.)

The distinction is precisely indicated in the opinion of the court by Mr. Justice Gray in the case of Belknap vs. Schild, 161 U. S., 10-18.

XX—F.

This Bill is Brought to Prevent Irreparable Injury and a Multiplicity of Suits.

The equities of this bill are to prevent irreparable injury and a multiplicity of suits to which Southern Railway Company has a common defense, involving questions of law common to all said suits. The Act of the General Assembly of North Carolina, ratified March 6, A. D. 1899, Chapter 164, and amendments thereto, provides that certain penalties, in some instances amounting to $500 per day, shall be incurred by any railroad company which fails to observe and obey any orders, rules or regulations of North Carolina Corporation Commission. As hereinbefore stated, many suits under the several provisions of this Act are threatened

by defendants, Greensboro Ice and Coal Company, McNeill, Rogers and Beddingfield, and other parties to complainant unknown at present. In this situation a bill for injunction will lie to prevent multiplicity of suits.

> "Where a failure to obey an order made by a State railroad commission against an express company, which was unauthorized and void, would under the State statutes, subject the company, in its daily business, to large numbers of individual actions, and to heavy penalties, a court of equity has jurisdiction of a suit to enjoin enforcement of such order, on the ground that its decree will avoid a multiplicity of suits and afford a more efficacious remedy than can be had at law."
>
> Dinsmore vs. So. Express Co., 92 F. R., 714, 715.

The Supreme Court of the United States has said in the Nebraska Maximum Freight Rate Case:

> "The carrier is made liable, not only to individual persons for every act, matter, or thing, prohibited by the statute and for every omission to do any act, matter, or thing required to be done, but to a fine of from $1,000 to $5,000 for the first offense, from $5,000 to $10,000 for the second offense, from $10,000 to $20,000 for the third offense, and $25,000 for every subsequent offense.
>
> "The transactions along the line of any one of these railroads out of which causes of action might arise under the statute are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree according to the prayer of the bills would avoid a multiplicity of suits and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transac-

> tions of a single week would expose any company, questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency, and determine once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community, as involved in the use of a public highway and in the administration of the affairs of the quasi public corporation by which such highway is maintained."
>
> Smyth vs. Ames, 169 U. S., 517 (42 L. Ed., 839).

These cases are conclusive of the jurisdiction of this court to entertain a bill in equity to prevent a multiplicity of suits which may be brought under the North Carolina statute, and it would not be necessary even to have threats of such suits, as is the case.

Furthermore, the jurisdiction of equity is sustained on the ground that Southern Railway Company has a common defense to all of said threatened suits, involving a question of law common to all of said suits.

It was held by the Circuit Court of Appeals for the Fourth Circuit, that:

> "If it appears from the face of the bill that the defendants have the same defense, arising from a common interest in the matter of litigation and that by one comprehensive suit in equity all the rights and interest of the defendants can be determined as between them and the Virginia-Carolina Chemical Company, then a bill in equity can be maintained. DeForest vs. Thompson, 40 F. R., 375; 1 Pom. Eq. Jur., pars. 245-269, inclusive. Jones vs. Andrews, 10 Wall., 327-333, 19 L. Ed., 935."
>
> Va.-Carolina Chem. Co. vs. Home Ins. Co., 113 F. R., 1, 5 (C. C. A.).

"The case is peculiarly one in which the jurisdiction of a court of equity may be invoked in order to avoid a multiplicity of suits. It belongs to the class "where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone." 1 Pom. Eq. Jur. Secs. 245, 255, 257, 268, 269, 273, and authorities cited in notes to these sections. Crews vs. Burcham, 1 Black., 352, 357. In such cases the plaintiffs are united by a common tie created by identity of interest in the decision of the same questions of law and of fact and have a common adversary. The fact that several tracts of land here in dispute were entered at different dates and by different persons is of no consequence as the validity of each entry as against the railroad company depends upon precisely the same questions of law and fact."

Osborne vs. Wis. C. R. Co., 43 F. R., 824, 827.

The same principle is affirmed in the following cases:

L. & N. R. Co. vs. Smith, 128 F. R., 1 (C. C. A., 5th Cir.).

Pennefeather vs. Baltimore Steam Packing Co., 58 F. R., 481.

Western Land Co. vs. Guinault, 37 F. R., 523.

Western U. Tel. Co. vs. Norman, 77 F. R., 13.

XX—G.

This is Not a Suit to Restrain Cases Already Pending in State Courts Contrary to Section 720 United States Revised Statutes.

It was claimed below that this bill is filed to restrain suits already pending in the State Court of North Carolina, and should therefore be dismissed under Section 720, U. S. Revised Statutes, which prohibits an injunction to restrain suits pending in State courts.

In answer to this, we point to the fact that the bill merely asks an injunction against the bringing of any further suits for the recovery of penalties. It is not sought to restrain any suits already brought and now pending in the courts of North Carolina. The case of Texas & P. R. Co. vs. Kuteman, 54 F. R., 547, decided by the Circuit Court of Appeals for the Fifth Circuit, is directly in point. The court there held:

> "A Federal Court is not prohibited by Revised Statutes, Section 720, from issuing an injunction to restrain the prosecution in a State court of a multiplicity of threatened suits which have not been actually begun."

In that case, the court further held:

> "A railroad company which is threatened with separate suits, under the Texas law, before a justice of the peace, for every car load as to which overcharge is alleged has no adequate remedy at law, and may obtain an injunction to restrain the prosecution of such suits."
> 54 F. R., 547, 548.

XX—H.

This Suit Does Not Violate Section 720 United States Revised Statutes, Because North Carolina Corporation Commission is not a "Court" in the Sense of the Federal Statute.

Section 720 United States Revised Statutes reads as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."
>
> Sec. 720 Revised Statutes of the United States.

It is not the purpose of this brief to go very elaborately into what constitutes a "court" in the sense of the Federal Statutes. The word, however, has a well defined meaning, as will appear from a brief examination of the cases.

It has been held by this Court that a Judge at Chambers is not a court in the sense of the Federal Statutes, and that this is true both as to State Judges and Federal Judges.

> "As, under Revised Statutes, Section 709, a writ of error will go from this court only to the final judgment of the highest court of the State in which a decision in the suit can be had, it is evident that our jurisdiction in this case can not be sustained, unless an order of a judge at Chambers, remaining a prisoner in a habeas corpus proceeding, can be regarded as an order of a 'court' within the meaning of this section.
>
> "We held, however, in Carper vs. Fitzgerald, 121 U. S., 87 (30:882), that an appeal did not lie to this court

> from an order of a circuit judge of the United States, sitting as a judge, and not as a court, discharging a prisoner brought before him on a writ of habeas corpus, for the reason that the Act of March 3, 1885 (23 Stat. at L.,437) gave an appeal to this court in habeas corpus cases only from the final decision of a circuit *court*;"
> McKnight vs. James, 155 U. S., 685-687.

In the case of Gurnee vs. Brunswick, Vol. 11, Federal Cases, No. 5872, Chief Justice Waite decided that a "Board of Supervisors," created by the laws of the State of Virginia and empowered to pass on and allow claims, was not a court, although certain accounts and claims were presented to them, considered and disallowed, the Attorney General of the Commonwealth representing the county in that proceeding.

The contention was pressed that the proceeding was a suit before a State court. In answer to this Chief Justice Waite discussed the elements essential to constitute a court as well as a suit.

Amongst other things he said:

> "In the Sewing Machine Cases, 18 Wall. (85 U. S.) 585, a suit was defined to be, 'Any proceeding in a court of justice in which a plaintiff pursues his remedy to recover a right or claim.' The board are the representatives of the people elected to supervise the business of the county, which has been, by law, committed to their care. They constitute a branch of the executive department of the government, not of the judiciary. A part of their duties is to 'examine, settle, and allow accounts,' chargeable against the county, and when settled, to issue warrants and levy taxes for the payment. They are the officers charged by law with the duty of auditing claims. Demand of payment must be made on them; they alone represent the county for that purpose. When an account is

presented to them, it is for allowance not for adjudication. In settling and allowing, they do not act judicially. They simply recognize the claim as valid against the county, and allow it, or they reject it. They render no judgment and issue no execution. Their duty is to direct payment of the accounts by the proper officer, and to provide him with the necessary means for that purpose by taxation. When they have made their allowance, the account has become liquidated, and may be sued without further demand. All these duties are purely administrative, and the proceeding by which their performance is enforced partakes in no respect whatever of the character of a suit. There are no parties, save the claimant and the board; the board occupy one side, and the claimant the other. It is true the attorney for the commonwealth is required to represent the county, and resist improper allowances, but in this he appears rather as the legal adviser of the board than as the manager of the cause of a litigant. Apply another test. The act of Congress provides for the removal, under certain circumstances, of any suit of a civil nature, at law or in equity, pending in any State court. If the board were a court, and the proceeding before them a suit, the case could have been removed while pending before the appeal. But the right of such removal, we think, will hardly be claimed, for the obivious reason that the relief asked of the board is administrative only, and not judicial. They were asked to pay, not to enforce payment. If however, the board disallow the claim, and refuse to provide for its payment, judicial action becomes necessary. For this an appeal is given to the courts—not an appeal from one court to another, but to a court from the executive. By the appeal a suit is commenced, and thereafter the proceeding is judicial."

Gurnee vs. Brunswick, 11 Federal Cases No. 5,872.

From the foregoing passage it is clear that Chief Justice Waite was of the opinion that to constitute a court there must be a claimant and a defendant; in other words

parties; that there must be a judge acting judicially; that there must be a suit or "proceeding in a court of justice in which a plaintiff pursues his remedy to recover a right or claim," to use the language of this court (18 Wall., 585).

Blackstone defines a court as consisting of at least three constitutent parts, namely, the actor, or plaintiff, who complains of an injury; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy.

People vs. Board of Trustees, 39 N. Y. Supp., 607.
People vs. Van Allen, 55 N. Y., 31.

A court is an instrumentality of government. It is a creation of the law, and in some respects it is an imaginary thing, that exists only in legal contemplation. A time when, place where, and the persons by whom judicial functions are to be exercised are essential to complete the idea of a court. It is its organized aspect, with all these constitutent elements of time, place, and officers, that completes the idea of a court in the general legal acceptation of the term.

White County Com'rs vs. Gwin, 36 N. E. 237, 136 Ind., 562.

Courts are the only agencies of the law by which a cause can be heard and determined. They are the only depositaries of judicial power. Without them it lies dormant and inactive in the sovereignty of the State. Its active and potent existence is inseparable from that of a court. To con-

stitute a court, the judge or judges must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of the court. The proceedings of a court at a time and place other than that prescribed by law are void. It is not the act of a court at all.

Johnston vs. Hunter 50 W. Va. 52, 40, S. E. 448, citing numerous cases.

A preliminary examination before a United States Commissioner is not a proceeding "in any court of the United States" within the meaning of the Federal Statutes.

Todd vs. United States 158 U. S., 278.

Mr. Justice Brewer in delivering the opinion of the court in the last above mentioned case quotes, with approval, the following language of Mr. Justice Story:

> "A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law."

158 U. S., 278-284.

In the case of Upshur County vs. Rich, 135 U. S., p. 467, 34 L. Ed., 196, Mr. Justice Bradley, reviewed all the decisions, and deduced the following as the result:

> "The principle to be deduced from these cases is, that a proceeding not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and can not

in any just sense be called a suit; and that an appeal in such a case to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion, and value, is not a suit; but that such an appeal may become a suit if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case, on the one side and the other."

135 U. S. 467, 477; 34 L. Ed. 196, 200.

The following extract from the opinion of Mr. Justice Bradley reviewing all the cases, conclusively establishes that a proceeding before a body such as the North Carolina Corporation Commission is not a suit and does not become a suit until it reaches "a court of justice:"

"The question, What is a 'suit' in the sense of the Judiciary Laws of the United States? has been frequently considered by this court. Reference may be made particularly to the following cases: Weston vs. Charleston, 27 U. S., 2 Pet., 449, 464 (7:481, 485); Kendall vs. United States, 37 U. S., 12 Pet. 524 (9:1181); Homes vs. Jennison, 39 U. S., 14 Pet. 540, 566 (10:579, 585); Ex Parte Milligan, 71 U. S., 4 Wall., 2, 112 (18:281, 291); Kohl vs. United States 91 U. S., 367, 375 (23:449, 452); Gaines vs. Fuentes, 92 U. S., 10, 21, 22 (23:524, 527, 528); Mississippi & R. R. Boom Co. vs. Patterson, 98 U. S., 403, 406, (25:206, 208); Ellis vs. Davis, 109 U. S., 485, 497 (27:1006, 1010); Hess vs. Reynolds, 113 U. S., 73, 78 (28:927, 929); Pacific Railroad Removal Cases, 115 U. S., 1, 18, (29:319, 325); Searl vs. School District No. 2, 124 U. S., 197, 199 (31:415, 417); Delaware County vs. Diebold Safe & Lock Co., 133 U. S., 473, 486, 487 (33:674, 680).

"In the four cases first cited this court determined that writs of prohibition, mandamus and habeas corpus, prosecuted for the attainment of the parties' rights, are suits within the meaning of the law, the judgments

upon which, in proper cases, may be removed into this court by writ of error. In Weston vs. Charleston, Chief Justice Marshall said: 'Is a writ of prohibition a suit? The term is certainly a very comprehensive one and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit.' This definition is quoted with approbation by Chief Justice Taney in Holmes vs. Jennison, which was a case of habeas corpus, and by other judges in subsequent cases.

"Mississippi & R. R. Boom Co. vs. Patterson, Pacific Railroad Removal Cases, and Searl vs. School District were cases of the assessment of the value of land condemned for public use under the power of eminent domain. The general rule with regard to cases of this sort is, that the initial proceeding of appraisement by commissioners is an administrative proceeding, and not a suit; but that if an appeal is taken to a court, and a litigation is there instituted between parties, then it becomes a suit within the meaning of this Act of Congress. In Mississippi & R. R. Boom Co. vs. Patterson, the company was authorized by the State laws of Minnesota to take land for the purpose of its business and to have commissioners appointed to appraise its value. If their award was not satisfactory, either to the company or to the owner of the land, an appeal lay to the district court, where it was to be entered by the clerk 'as a case upon the docket,' the land owner being designated as plaintiff and the company as defendant. The court was then required to proceed to hear and determine the case in the same manner that other cases were heard and determined. Issues of fact were to be tried by a jury unless a jury was waived. The value of the land being assessed by the jury or the court, as the case might be, the amount of the assessment was to be entered as a judgment against the company,

subject to review by the Supreme Court of the State on writ of error. This mode of proceeding was followed. The Boom Company and the land owner both appealed from the award of the commissioners. When the case was brought before the district court, the owner, being a citizen of another State, applied for and obtained its removal to the Circuit Court of the United States, where it was tried before a jury and a judgment was rendered upon their award. We held that the appeal in that case was a suit within the meaning of the Act of Congress authorizing the removal of causes from the State to the federal courts. Mr. Justice Field, speaking for the court, said: 'The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the Commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents.'

"In Delaware County vs. Diebold Safe and Lock Company, it was held that where a claim against a county is heard before county commissioners, though the proceedings are, in some respects, assimilated to proceedings before a court, yet they are not in the nature of a trial *inter partes*, but are merely the allowance or disallowance by county officers, of a claim against a county, upon their own knowledge, or upon any proof that may be presented to them; but that an appeal from their decision, tried and determined by the Circuit Court of the county, is a suit removable to the Circuit Court of the United States."

Upshur County vs. Rich, 135 U. S., 467; 34 L. Ed., 196.

In the case of Fuller vs. County of Colfax, 14 F. R., p. 177, 178, the court speaks as follows:

"Now what is usually understood by the words *'court'* and *'suit'* where we find them in legislative enactments or in legal proceedings? Blackstone says a 'court is a place wherein justice is judicially administered.' To administer justice judicially, there *must* be a *judge*, and usually, though not always, there are also other officers, such as clerk and sheriff or marshal. That also implies the right to issue compulsory process to bring parties before the court so that jurisdiction may be acquired over the person or property which forms the subject-matter of the controversy. To administer justice judicially, two parties to a controversy must exist; there must be a wrong done or threatened, or a right withheld, before the court can act. Then a hearing or trial follows, and the 'justice to be judicially administered' results in a formal judgment for one of the parties to the controversy. The judgment to be pronounced usually has full binding force, unless modified or reversed. The courts can issue the proper process to carry their judgments into effect, and in that way subserve the great ends of their creation. But this is not so with the county boards in this State. They are not clothed with the necessary power to issue compulsory process to bring parties litigant before them. They can not, in cases like the one under consideration issue process to compel the attendance of witnesses. They can not and do not enter formal judgments in cases presented to them for their consideration. They have no authority to execute any judgments if they should thoughtlessly undertake to enter them. They have but one party before them on whom their orders can operate. In short, the county board is so totally unlike a *court*, and so different in its constitution and its objects, that I am unable to see any similarity between them.

"If the county board can not be regarded as a *court*, it will follow as a necessary consequence that no *suit*

> was pending in this case until the appeal from the order of the board was filed and docketed in the district court. Two parties to a suit seem to be almost indispensable: one who seeks redress, and the other who commits a wrong or withholds what is justly due another. The parties must stand in such relation to each other that the machinery of the court will operate on them when their powers and their aid are invoked. No such a condition of things existed so long as this claim remained before the county board. But when the appeal was taken, and docketed in the district court, we then for the first time, find a *suit* pending in a *court* where none of the elements of either are wanting. It is such a *suit* that can be removed from such a *court*, as the removal acts of Congress contemplate."
>
> Fuller vs. County of Colfax, 14 F. R., 177, 178.

The Supreme Court of North Carolina has directly held that the Corporation Commission of North Carolina is not a "judicial court."

In the case of State ex rel. Caldwell vs. Wilson, 121 N. C., 425; 28 S. E., pp. 544-562, the following language appears:

> "Our conclusion is that the Railroad Commission does not stand upon the same footing as the criminal courts, inasmuch as it is an administrative, and not a judicial court. While it was made by a subsequent statute a court of record, it was clearly the object of the Act simply to give authenticity to its records and proceedings, as it added nothing to its duties or powers. It has been held to be a court of record in Atlantic Express Co. vs. Wilmington & W. R. R. Co., 111 N. C., 463, 16 S. E., 394; but in the opinion of the court delivered by Chief Justice Shepherd, appears the significant qualification: 'Whether a court having no power to enforce its judgment fulfills the definition of a court of record and of general jurisdiction, when necessary to be considered.' The Supreme Court of the United States in Reagan vs. Trust Company, 154 U. S., 362, 397, 14

Supreme Court, p. 1047, citing the Railroad Commissioners cases, 116 U. S., 307, says: 'There can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroads or other carriers, and that this regulation can be carried on by means of a Commission. Such a Commission is merely an administrative board, created by the State for carrying into effect the will of the State, as expressed by its Legislature.'"

State ex rel. Caldwell vs. Wilson, 121 N. C., 425, 28 S. E., pp. 544-562.

Again, the doctrine was confirmed in the case of State vs. Wilmington & Weldon Railroad Company, reported in 122 N. C., 877; 29 S. E., p. 334.

In that case the Supreme Court of North Carolina declined to entertain an appeal made direct from the Corporation Commission to the Supreme Court, and held that such an appeal would only lie from the Superior Court and that the North Carolina Corporation Commission was not such a body or court, as to permit or allow of an appeal being taken from it direct to the Supreme Court. In announcing this opinion, the Supreme Court of North Carolina used the following language:

"The railroad commission is a court of record (Acts 1891, c. 498), and a court 'inferior to the Supreme Court,' in the purview of Section 12, Art. 4, of the Constitution, and, of course, with powers inherent in all courts as to punish for contempt, etc. (Express Co. vs. Wilmington & W. R. Co., 111 N. C., 463, 16 S. E., 393); but, as was held in State vs. Wilson, 121 N. C., 425, 28 S. E., 554, it is an administrative court, somewhat like the board of county commissioners. It can issue no execution upon the fines or penalties laid by it, but they must be collected by action in the Superior Court (Mayo vs. Telegraph Co., 112 N. C., 343, 16 S. E., 1006); and in such action the railroad commission

occupies the position of relator, and not that of a lower court, from which an appeal has been taken. Railroad Commissioners vs. Western Union Tel. Co., 113 N. C., 213, 18 S. E. 389. Its orders and regulations are merely the basis of judicial action in the Superior Court to enforce them or punish their violation. Acts 1891 c. 320 Secs. 7, 10. If, therefore, this court could entertain appeals direct from an order of the railroad commission, it would be assuming original jurisdiction of a matter as to which, though heard and determined by a board of competent jurisdiction (Leavell vs. Telegraph Co., 116 N. C., 211, 21 S. E., 391), there has been no judicial adjudication of its validity nor proceedings to punish its violation, whereas, the jurisdiction of this court is appellate only, except in the case of claims against the State (article 4, sec. 9), in which instance its decisions are merely recommendatory."

State vs. W. & A. R. R. 122 N. C. 877.

In disposing of the question as to whether or not Section 720 Revised Statues of the United States was violated by granting the present injunction, the court below used the following language:

"True, the Corporation Commission of North Carolina is, in words, made a court of record, and it is conceded the Circuit Court of the United States can not restrain a state court, but the Corporation Commission is vested with powers not judicial, some of which have been held to be legislative, some executive, and the restriction on the injunction of this court as to State courts does not apply, especially inasmuch as the acts complained of and asked to be enjoined are not judicial acts."

134 F. R. 82, 94.

The precise point was passed upon in the case of Western Union Telegraph Co. vs. Myatt, 98 F. R. 335-355, the court in that case holding as follows:

> "It is contended on behalf of defendants that by this suit the complainant is attempting to enjoin a proceeding pending in a State court contrary to the provisions of Section 720 of the Revised Statutes prohibiting the granting of the writ of injunction by any court of the United States to stay proceedings in any court of a State except where authorized in proceedings in bankruptcy. The error in this contention lies in the fact that it involves an assumption that the court of visitation is a court within the meaning of the Section mentioned, whereas, whether it is a court or not is one of the vital questions raised for determination in this case. It can not be said that because a board or tribunal is denominated a court by the law creating it all inquiry as to its true character is precluded and that it must be conclusively assumed to be a court, whether rightly so or not."
>
> 98 F. R. 335, 355.

Again, in the same case, at pages 360-361.

> "Whenever it is claimed that the purpose and effect of a writ of injunction granted by a court of the United States is to stay proceedings in a court of a state, it is competent for the former court to ascertain and determine whether the board or body created by the laws of the State and before whom the proceedings sought to be enjoined are pending, is in fact and in law a court. The jurisdiction of a court of the United States can not be denied by an unconstitutional enactment of a state legislature nor by an erroneous use of the terms therein. The court of visitation of the State of Kansas, can not lawfully exercise judicial functions nor is it a court within the meaning of Section 720 of the Revised Statutes of the United States."
>
> 98 F. R. 355, 360-361.

Again, at pp. 344-346-98 F. R.

"What, then, is the nature of the powers conferred upon the court of visitation? It is apparent from even a cursory examination of those parts of the act of the legislature which define the primary powers and jurisdiction of that body that they are largely of a legislative or administrative character, and such as do not pertain to the functions of a court. It is difficult to define the precise difference between those that are legislative and those that are administrative. It is unnecessary, however, to do so in this case, for it is immaterial whether the powers of that court, so called, aside from those that are judicial, are of the one character or of the other, or are a blending of both. A court does not (to use the language of the Act) "Classify freight," nor "require the construction and maintenance of depots, switches, side tracks, stock yards, cars, and other facilities for the public convenience," nor "regulate crossings and intersections of railroads," nor "regulate the operation of trains" over such crossings and intersections, nor "prescribe rules concerning the movements of trains to secure the safety of employes and the public," nor "require the use of improved appliances and methods to avoid accidents and injuries to persons," nor "apportion transportion charges among connecting carriers," nor "regulate charges for part car load and mixed car load lots of freight, including live stock," nor prescribe what rates of transportation of freight and passengers shall be charged. The regulation of such matters is legislative in its character, not judicial. The Express Cases, supra. Of course, courts of chancery, in the exercise of their equity jurisdiction, may, and frequently do, through the medium of receivers, appointed by them, exercise some such powers in the administration of property which is the subject-matter of litigation in such courts, and especially where, in order to preserve the value of such property while it is in the possession of the court, it is necessary to continue the operation thereof, and maintain it as a going concern. But it is not in such sense that these powers were conferred upon the court of visitation. Courts also have the undoubted power to determine some of these matters, if

they properly lie in the road to the ultimate adjudication of other existing controversies concerning which the jurisdiction of the court has been invoked; as, by way of illustration, where, in litigation over the destruction of life or property in a railway accident, it becomes material to ascertain whether the company used proper appliances and methods to avoid such an occurence. Nor is it to this end that the powers mentioned were conferred upon the court of visitation. The exercise of the powers granted contemplates the prescribing of rules and regulations for future guidance, and the possession of such powers by the court of visitation makes it one of the potential agencies of the legislative department of the State. To use the expression of a learned justice of the Supreme Court, the court of visitation, in respect of such functions, is "an active, seeking, supervising body; the eye and the activity of the State." As to such powers and duties the court of visitation is not, and can not be, a court. * *

"It was argued at the bar on behalf of the defendants that the powers conferred upon the court of visitation are judicial in their character, for the reason that the law contemplates an investigation and consideration on the part of the court before final action is had; and it is particularly recalled that such contention was made with reference to paragraphs 8 and 9 of Section 8 of the act, which authorize the court of investigation to "prescribe rules concerning the movements of trains to secure the safety of the employes and the public, and to require the use of improved appliances and methods to avoid accidents and injuries to persons." Investigation as a precedent to action is not exclusively an attribute of a judicial proceeding. Counsel confounds the usual legislative inquiry which precedes the passage of laws with the judicial consideration of a controversy in a court of justice. It certainly would not be claimed that the hearing and consideration by committees of legislative bodies of the views and opinions of men having special knowledge of matters to be affected by proposed legislation constitute in any sense the exercise of judicial functions, or that such committees are judicial tribunals. Nor does it follow that, because the

exercise of the powers conferred upon the court of visitation requires the use of judgment and discretion, such powers are judicial in their nature, as that would make every executive act and legislative act requiring judgment and discretion a judicial act. To use the language of the Supreme Court of Kansas in The Auditor vs. Railroad Co., 6 Kan. 509:

> 'It certainly could not be so, in the sense in which our constitution uses the term, or it would of necessity obliterate the lines by which the framers of that instrument sought to keep separate and distinct the three branches of our government.'
>
> 'As said in Re Huron, 58 Kan. 156; 48 Pac. 576; 36 L. R. A. 824:
>
> 'Not every one who hears testimony and exercises discretion and judgment in a matter submitted to him is necessarily a judicial officer.'
>
> 'Counsel say:
>
> 'The decision of a question which may arise between different railroad companies as to how much of a certain charge each shall have is as much a judicial function as to decide how much of an estate each of the heirs shall receive.'

"That may be true where there is such a controversy pending in a court between the railroad companies themselves, but that is not the sense in which the power is conferred upon the court of visitation. The intent of the act of the legislature was, not to authorize the adjudication of distinct controversies of that character between contending railroad companies, but, instead thereof, the laying down of a rule in behalf of the State and the public, and the securing of the future obedience thereto by the imposition of fine and imprisonment. Is not that process legislation, and is not the result a regulation or a law?

"The fact that the legislature denominated the tribunal a court is not conclusive as to its true character, nor as to the nature of the jurisdiction and the powers conferred uon it. The question is not determined by the

terminology employed in the act, although the legislative purpose and intent may be evidenced thereby, but it is determined rather by the ascertainment of the essential nature of the jurisdiction and powers themselves. The constitution of the State of Kansas authorizes the creation of courts inferior to the Supreme Court by act of the legislature, and, by necessary implication, the defining of the jurisdiction of the courts so created. Article 3, Section 1. Nevertheless such jurisdiction must, in all essential particulars, be judicial in its character, and the constitutional authority for other courts than those specifically named in the constitution must be so construed and limited. Under the constitution, the legislature may not create a court for the exercise of its own legislative functions, or for the performance of purely administrative or executive duties; and though a tribunal, as constituted by legislative act, may be denominated a court, may possess a seal, and be clothed with the usual and customary vesture of a judicial tribunal, yet its real character is determined by its jurisdiction and the functions it is empowered to exercise. The legislature may create a court of visitation, but it can only be a court in respect of matters of a judicial nature, and such as are properly incidental thereto."

98 F. R. 344-345-346.

In August Busch & Co. vs. Webb, 122 Fed. 655, it was held that the Commissioners' Court of a county in Texas in declaring and publishing the result of an election acts ministerially and is not a court within the meaning of Revised Statutes, Section 720. On page 665 the court said:

"The contention of the defendants that the Commissioners' Court of Grayson county is a court within the meaning of the law, and that their action can not be restrained by an injunction, as contemplated by Section 720 of the Statutes of the United States (U. S. Comp. St. 1901, p. 581), to my mind, is without merit. The duty of said body to declare the result of said election

and to publish such result is purely ministerial, and in no wise judicial. It is true that many duties of a court proper are ministerial, but they are clothed with judicial functions, such as deciding litigated questions between litigants, etc. The Commissioners' Court is not a court, in my opinion, within the meaning of said Article 720 of the Revised Statutes, and therefore this contention can not be sustained."

122 F. R. 655, 665.

In the case of Louisville & Nashville R. R. Co. vs. Brown, 123 F. R. 946, an injunction was granted against the Florida Railroad Commission. The point was made that this was an injunction against a State court. Dealing with this point Judge Pardee said:

"The main contention of the respondents is that as the legislative act which creates and defines the powers and authority of the railroad commission vests in the said commission 'judicial powers to do or enforce or perform any function, duty or power conferred upon them by the act to the exercise of which judicial power is necessary,' the said commission, in performing the various powers and duties vested in the commissioners by the act, is a state court, within the meaning of Section 720 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581), which prohibits any court of the United States from issuing an injunction restraining proceedings in any court of a State. An inspection of the act of the legislature of the State of Florida creating the railroad commission shows that, as is usual in such cases, the commission is vested with executive, legislative and quasi judicial powers, but does not show that the commission is to any degree created and established as a court for the final adjudication and determination of the rights of individuals or the rights of property."

123 F. R. 947-8.

As heretofore stated the Supreme Court of North Carolina has decided that the North Carolina Corporation Commission is not a "judicial court." Nevertheless, it may be interesting to paraphrase the language of the United States Circuit Court above cited from the case of Western Union Telegraph Co. vs. Myatt.

Surely the following are not functions of a court: "The commission shall have power and are directed to make just and reasonable rates of charges for the transportation of messages by any telegraph or telephone company." That they are empowered and directed "to require * * * the establishment of stations * * * to require the erection of depot accomodations." "To require a change of any station or the repairing, addition to, or change of any station house by any railroad or other transportation company." "To require any two or more railroads * * * to have one common or union passenger depot." "To require the establishment of separate waiting rooms." "To require the construction of side tracks * * * to industries." To "make reasonable and just rates of freight, passenger and express tariffs for railroads, street railways, steamboats, canal and express companies." "The Commission shall make rules and regulations and rates governing demurrage and storage charges by railway companies and other transportation companies, and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freights after the same have been received by the transportation companies for shipment." "That the corporation commission prescribe the rate of speed at which trains may run through said municipalities." "To have and exercise general supervision over the tax listers and assessing officers of this State." "To make such rules for the government of the banks and banking institutions of the State not inconsistent

with law." To "appoint a suitable person or persons to make an examination of and into the affairs of every bank, etc."

See Apendix A to this brief, North Carolina Corporation Commission Law.

From all the foregoing it is quite clear that the Corporation Commission of North Carolina is not a court in the sense of Section 720, Revised Statutes of the United States.

While it might be proper to consider at this juncture the effect of the combination of legislative, judicial and executive powers in said Corporation Commission, an examination of that question will be postponed until another part of this argument is reached. Having, therefore, disposed of all the jurisdictional questions arising on this record we will now proceed to take up the merits of this litigation.

XXI.

The Four Cars of Coal in Question Were and Are Interstate Commerce and Beyond Control of North Carolina Corporation Commission.

The first position taken by Southern Railway Company is that the four cars of coal in question, having originated in the States of Pennsylvania, West Virginia and Tennessee, and having been hauled in each instance as one continuous uninterrupted shipment over Southern Railway Company's lines and connections to Greensboro, North Carolina, said coal remaining in the cars in which it was originally loaded and not having been delivered to the consignee, said car loads were articles of interstate commerce, and beyond the power of interference by North Carolina Corporation Commission, or any State officers purporting to act under the laws of North Carolina, and that any laws or statutes of said State which

attempted to permit any such interference with said interstate car loads were and are unconstitutional and void. The defendants, McNeill, Rogers and Beddingfield, have held that when the said car loads of freight arrived at Greensboro, and when the freight was paid on them, although they were not delivered to Greensboro Ice and Coal Company on account of unpaid demurrage, yet, nevertheless, upon payment of the freight, they ceased to be subjects of interstate commerce. The Supreme Court of the United States has directly decided that, where the articles are still in the cars and undelivered, they are subjects of interstate commerce, and that the transfer of said articles from the car to the depot or station is a part of the interstate transportation. In the case at bar it will be noted that even such transfer had not taken place, and unquestionably the interstate transportation was uncompleted.

> "Moving intoxicating liquors from the station platform to the freight warehouse of a railroad depot on their arrival at their destination in Iowa is a part of the interstate commerce transportation, when they were shipped from another State, and is not a violation of the Iowa statute making the transportation of such liquors from one place to another an offense."
>
> Rhodes vs. State of Iowa, 170 U. S., 412 (42 L. Ed. 1089).

This case is conclusive of the fact that the car loads in question were still in process of interstate transportation and beyond the control of North Carolina, or any of its laws, or officers.

Inasmuch as three of the cars in question belong to other railroad companies, to wit: The Chesapeake & Ohio Railroad Company and the Norfolk and Western Railway Com-

pany, it is interesting to note that the Supreme Court of Appeals of West Virginia has held:

> "A railroad car sent loaded with freight from another State into this State and to be returned loaded to the former State in the transaction of interstate commerce, can not be levied upon under an attachment in this State; nor will another railroad company having such cars in its possession in the process of carrying on interstate commerce be liable to garnishment by reason of its possession received from another company, against which an attachment was issued. This is because of the Commerce Clause of the National Constitution and the Interstate Commerce Act of Congress."
>
> Wall vs. N. & W. Rd. Co., 52 W. Va., 485; 44 S. E., 294.
>
> Connery vs. R. R. Co., 92 Minn., 20; 99 N. W. 365.

The following definition of Interstate Commerce was given by the United States Supreme Court in the case of The Daniel Ball, 10 Wall., 565; 19 L. Ed., page 999, 1002. In that case the Supreme Court said:

> "Whenever a commodity has begun to move as an articles of trade from one State to another, commerce in that commodity between the States has commenced."

In the case of Kelley vs. Rhoads, 188 U. S., 1; 47 L. Ed., 359, the Court held:

> "A herd of 10,000 sheep which is being driven from the Territory of Utah, by a direct route across the States of Wyoming and Nebraska, at the rate of about nine miles per day, is the subject of Interstate Commerce, and is therefore exempt from taxation under Wyoming laws, 1895, Chapter 61, authorizing the taxing of live stock brought into the State for grazing purposes, although the sheep may, while actually in transit, have been permitted incidentally to support themselves by grazing overland one quarter of a mile in width, and might have been transported by rail."

Furthermore, the Act to Regulate Commerce, itself, provides that it shall and does apply to the "transportation of passengers or property" * * * "from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, etc."

Congress having legislated no State regulations can apply.

Gulf C. & S. F. R. Co. vs Hefley, 158 U S., 98.

Gulf C. & S. F. R. Co. vs. Miami S. S. Co., 86 F. R., 407.

Switching and terminal charges are exclusively covered by Act of Congress.

Fielder vs. M. K. & T. R. Co., 42 S. W. 362.
Walker vs. Keenan, C. C. A. 7th Cir., 73 F. R., 755.
I. C. C. vs. D. G. H. M. R. Co., 167 U. S., 633.
I. C. C. vs. C. B. & Q. Rd. Co., 186 U. S., 320.

It is well to bear in mind also that an article of interstate commerce remains wholly free from such State control, as long as it is in the original package.

Leisy vs. Hardin, 135 U. S., 100; 34 L. Ed., 128.

Unquestionably coal stored in a car in which it originally started on its transit is still in the original package. There can be no possible doubt on this subject.

See also Austin vs. Tenn., 179 U. S., 343.

This is not only the law of the United States but the Statutes of North Carolina themselves expressly disclaim any application to Interstate Commerce.

In the Act of the General Assembly of North Carolina, ratified March 6th, A. D. 1899, Chap. 164, the following clause appears in section 14:

"Provided that nothing in this act contained shall be taken as in any manner abridging or controlling the rates of freight charged by any railroad in this State for conveying freight which comes from or goes beyond the boundaries of the State and on which freight less than local rates on any railroad conveying the same are charged by such railroads, but such railroad company shall possess the same power and right to charge such rates for carrying such freight as they possessed before the passage of this Act. Provided further, however, that upon the complaint of any person or persons, corporation or corporations to said commission of any unjust discrimination in carrying freight which comes or goes beyond the boundaries of the State by any railroad company, whether organized under the laws of this State or under the laws of another State and doing business in this State, the said Commission shall investigate said complaint, and if the same be sustained it shall be the duty of said Commission to bring said complaint before the Interstate Commission for redress in accordance with the provisions of the Act of Congress establishing said Interstate Commerce Commission, etc."

And it has been decided by the Supreme Court of North Carolina that said State has no control over Interstate Commerce. McGwigan vs. R. R., 95 N. C., 428.

The foregoing cases clearly establish the position of Southern Railway Company on the point now under discussion and the subject might safely be left here, were it not for the fact that in the court below the defendants contended that the action of North Carolina Corporation Commission in ordering said four cars of coal to be placed upon said private spur or side track of Greensboro Ice and Coal Company was an aid to and not an interference with interstate commerce.

It therefore becomes necessary to deal with this phase of defendants' contention.

For the sake of clearness this branch will be treated separately, although at the expense of some repetition.

XXII

Rules of North Carolina Corporation Commission as to Placing Cars Loaded with Interstate Freight and Orders of North Carolina Corporation Commission to Place the Four Cars of Interstate Freight Now in Question are Void Because Same Interfere with Interstate Commerce.

In discussing this point Southern Railway Company takes the position that said rules and orders of North Carolina Corporation Commission are void.

(1) Because they deal with a subject national in its character, requiring uniform treatment throughout the United States, and a subject over which the action of Congress is exclusive, the States being powerless to interfere at all.

(2) Because Congress has in fact legislated on this particular subject, and the field is exclusively occupied by existing acts of the Federal Government.

We will now address ourselves to proposition (1).

In Section 12 of defendants' answer filed in this cause North Carolina Corporation Commission allege:

> "These defendants are advised that the orders made by them hereinbefore referred to do not constitute an interference with interstate commerce as alleged in said paragraph 12 (referring to Bill of Complaint); nor with the right of the complainant to conduct its business according to its reasonable rules and regulations except so far as the corporation commission has the right and power to control its rules and regulations by virtue of said act creating the corporation commission, and the

amendment thereto contained in Chapter 342, Public Laws 1903, whereby the power is expressly conferred upon the North Carolina Corporation Commission by sub-section 26 'to make rules governing railroad companies in the placing of cars for loading and unloading, and in fixing time limit for the delivery of freights after the same have been received by the transportation companies for shipment.' And these defendants further say that, having full power to provide for placing cars for unloading, and in conformity with the rules of the said North Carolina Corporation Commission, the orders complained of in the bill were in strict conformity to the law, and finally adjudged and made after the complainant company had full opportunity to make defense as to its alleged rights in the premises."

Printed Transcript of Record, p. 20.

Defendants clearly state they have the right to make rules for placing cars for loading and unloading, and fix a time limit for the delivery of freights under the said act of North Carolina, and have applied said rules to interstate commerce, and have actually made an order attempting to wrest from Southern Railway Company the possession and control of four cars loaded with interstate freight before same were delivered to consignee at Greensboro, North Carolina.

In this situation the order of the North Carolina Corporation Commission is attempted to be justified on the ground that it is an aid to interstate commerce, and not an interference with same, and cases were cited below attempting to support this position and distinction.

It may be well to say at this juncture that this court has never made any subdivision of the cases such as defendants seem to insist upon.

In other words, this court has never separated the cases into those which aid interstate commerce and those which interfere with interstate commerce, and it has never held that

the States may pass acts in aid of commerce, while they are forbidden to pass acts interfering with commerce.

The only classification of cases ever made by this court were the three classes set forth in Bridge Co. vs. Kentucky, 154 U. S., 204, 209, where it is said:

> "The power of Congress over commerce between the States and the corresponding power of individual States over such commerce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the States with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling upon one side of the line of demarkation bebetween the powers belonging exclusively to Congress, and those in which the action of the State may be concurrent. The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; Second, those in which the States may act in the absence of legislation by Congress; Third, those in which the action of Congress is exclusive and the States can not interfere at all.
>
> The first class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it can not be termed in any just sense an interference."
>
> 154 U. S., 204, 209-210.

This court goes on to say that the States may authorize the building of bridges over non-navigable streams, may construct turnpikes, railways and canals between points in the same State and regulate tolls for the use of same, etc. And that Congress has no power to interfere with police regulations relating exclusively to the internal trade of the State.

Coming to the second class where the State may exercise jurisdiction in the absence of Congressional action, this court points out as examples, the regulation of pilots, quarantine and inspection laws and the policing of harbors, the construction of bridges across navigable waters of the State, establishment of ferries, etc.

Referring to the third class, the court proceeds to say:

> "But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the *third* class—of those laws wherein the jurisdiction of Congress is exclusive."
>
> 154 U. S. 204, 212.

All the cases are elaborately reviewed and amongst others the case of Wabash, St. L., etc., R. Co. vs. Illinois, 118 U. S., 557 is reaffirmed, this court stating with reference thereto:

> "The substance of the opinion was that, if the prior cases were to be considered as laying down the principle that the States might regulate the charges for interstate traffic, they must be considered as overruled. See also Bowman vs. Chicago & N. W. R. Co., 125 U. S., 465. In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the Wabash case, and to that doctrine we still adhere."
>
> 154 U. S., 204, 217.

The case of Bridge Co. vs. Kentucky, 154 U. S., 204, has been cited and reaffirmed in the following cases, and is unquestionably the law.

Bridge Co. vs. Kentucky, 154 U. S., 224.
W. U. Tel. Co. vs. James, 162 U. S., 650, 655.
M. P. R. Co. vs. Nebr., 164 U. S., 403, 416.
C. & L. Turnpike Co. vs. Sandford, 164 U. S., 578, 586.
Henderson Bridge Co. vs. Kentucky, 166 U. S., 150, 153.
Henderson Bridge Co. vs. Henderson, 173 U. S., 592, 623.
K. & H. Bridge Co. vs. Illinois, 175 U. S., 626, 632.
Hanley vs. Kansas City S. R. Co., 187 U. S., 617, 620.
Champion vs. Ames, 188 U. S., 321, 352.
St. Clair County vs. Interstate S. & C. T. Co., 192 U. S., 454, 457.
St. Clair County vs. Interstate S. & C. T. Co., 192 U. S., 465.

The case of Wabash, etc., R. Co. vs. Illinois, 118 U. S., 557 has been cited and reaffirmed by this court in the following cases and is unquestionably the law.

Robbins vs. Taxing District of Shelby County, 120 U. S., 492.
Robbins vs. Taxing District of Shelby County, 120 U. S., 489, 493.
Fargo vs. Michigan, 121 U. S., 230, 238.
Fargo vs. Michigan, 121 U. S., 230, 247.
Philadelphia S. S. Co. vs. Pennsylvania, 122 U. S., 326, 346.
Western Union Tel. Co. vs. Pendleton, 122 U. S., 347, 357.
Mugler vs. Kansas, 123 U. S., 623, 676.
Bowman vs. C. & N. W. Ry. Co., 125 U. S., 494.
Bowman vs. C. & N. W. Ry. Co., 125 U. S., 508.
Dow vs. Beidelman, 125 U. S., 680, 689.
Leloup vs. Mobile, 127 U. S., 640, 648.
L. N. O. & T. R. R. vs. Mississippi, 133 U. S., 589.

L. N. O. & T. R. R. vs. Mississippi, 133 U S., 587, 591.
Leisy vs. Hardin, 135 U. S., 100, 110.
Leisy vs. Hardin, 135 U. S., 120.
Leisy vs. Hardin, 135 U. S., 152.
N. & W. R. Co. vs. Pennsylvania, 136 U. S. 114, 120.
Budd vs. New York, 143 U. S., 517, 537.
Budd vs. New York, 143 U. S., 547.
Brass vs. N. D., 153 U. S., 391, 405.
Bridge Co. vs. Kentucky, 154 U. S., 216.
Reagan vs. Farmers' Loan & T. Co., 154 U. S., 397.
Adams Express Co. vs. Ohio State Auditor, 165 U. S., 194, 234.
L. S. & M. S. Ry. vs. Ohio, 173 U. S., 285, 303.
L. S. & M. S. Ry. vs. Smith, 173 U. S., 684, 687.
Lindsay & Phelps vs. Mullen, 176 U. S., 126, 147.
C. C. C. & St. L. vs. Illinois, 177 U. S., 514, 518.
Cotting vs. Kansas, 183 U. S., 79, 85.
Cotting vs. Kansas, 183 U. S., 86.
L. & N. R. Co. vs. Eubank, 184 U. S., 27, 36.
Erie R. R. Co. vs. Purdy, 185 U. S., 148, 150.
Hanley vs. K. C. S. R. Co., 187 U. S., 617, 619.
Hanley vs. K. C. S. R. Co., 187 U. S., 620.
Champion vs. Ames, 188 U. S., 321, 352.
Northern Securities Co. vs. United States, 193 U. S., 197, 378.

In the Wabash case this court said:

"'The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within

the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce can not flourish in the midst of such embarrassments.'

"The applicability of this language to the case now under consideration, of a continuous transportation of goods from New York to Central Illinois, or from the latter to New York, is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi river. It is not the railroads themselves that are regulated by this Act of the Illinois Legislature, so much as the charge for transportation, and, in language just cited, *if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery*, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. 'It was,' in the language of the court cited above, 'to meet just such a case that the commerce clause of the constitution was adopted.'

"It can not be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States, and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the consti-

tution. Cook vs. Pennsylvania, 97 U. S., 566,574 (Bk. 24 L. Ed., 1018); Brown vs. Maryland, 12 Wheat, 419, 446 (25 U. S., Bk. 6, L. Ed. 688). And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce." (Italics ours).

Wabash, St. Louis and Pacific Ry. Co. vs. Illinois, 118 U. S., 557, 572-573; 30 L. Ed., 244, 249.

The Wabash case is conclusive of the point now under discussion for it is there laid down that the "times and modes of delivery" of interstate freight shall be free from any State regulation whatsoever. Consequently the act of North Carolina purporting to clothe the North Carolina Corporation Commission with power to make rules for "placing of cars for loading and unloading" and for fixing a "time limit for the delivery of freight" is void so far as interstate commerce is concerned, for this court has expressly held that the silence of Congress in reference to this very subject indicates that the States are without power to deal with it in any way. As said by this court in Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196:

> "Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise there would be no protection against conflicting regulations of different

> States, each legislating in favor of its own citizens and products and against those of other States."
> 114 U. S., 196, 204.

Again in the case of the Western Union Telegraph Co. vs. Pendleton, 122 U. S., 347, 358, this court said:

> "The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting State legislation. Such conflicting legislation would inevitably follow with reference to the telegraphic communications between citizens of different States, if each State was vested with power to control them beyond its own limits. The manner and order of the *delivery* of telegrams, as well as of their transmission, would vary according to the judgment of each State." (Italics ours).
> 122 U. S., 347, 358.

In the case last above mentioned this court commented upon the fact that the statute of Indiana actually provided that communications for or from officers of justice should take precedence over other telegrams. This court held the Indiana statute void.

In view of the foregoing it is clear all State legislation attempting to prescribe rules "for modes of transit, for times and modes of delivery" of interstate commerce (118 U. S., 557,572) is absolutely void. The statute of North Carolina in question conferring upon North Carolina Corporation Commission the power to make rules governing railroads "in the placing of cars for loading and unloading and in fixing a time limit for the delivery of freights" is void in so far as same relates to interstate commerce, and the rules passed by the North Carolina Corporation Commission pursuant to said statutory authority are likewise void and the order

of North Carolina Corporation Commission attempting to enforce said rules is likewise void, for the subject is national and within the exclusive jurisdiction of Congress.

In the court below defendant relied upon the case of Western Union Telegraph Co. vs. James, 162 U. S. 650 as an authority supporting the validity of the rules of North Carolina Corporation Commission.

Defendants entirely misunderstand and misinterpret said case.

In the case of Western Union Telegraph Co. vs. James, 162 U. S. 650, the Western Union Telegraph Co. was sued by one David W. James to recover a penalty under a statute of Georgia which provided that the company "shall transmit and deliver * * * with impartiality and good faith, and with due diligence, under penalty of $100."

James sent a telegram from Blakely, Georgia, to Eufaula, Alabama.

The Telegraph Company contended that the statute was void as an interference with interstate commerce. This court sustained the judgment for the penalty on the ground that the statute added nothing to the common law duties of the Telegraph Company.

The language of this court (162 U. S., 660) is as follows:

> "The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution

under discussion? We think not. No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct, or impede the company in the full and fair performance of its duty as an interstate sender of messages."

Western Union Telegraph Co. vs. James, 162 U. S. 650, 660.

The court distinguished this case from the case of Western Union Telegraph Co. vs. Pendleton 122 U. S. 347, where a statute of Indiana provided that messages should be sent in a certain manner and in a certain way and that they should be delivered within a certain radius by messengers. In other words, precise regulations as to the delivery of messages different from the rule of reasonable diligence required by the common law were imposed by the statute and were therefore held to be an interference with interstate commerce because it prescribed rules that might not be uniform in all the States.

The rules of North Carolina Commission governing the delivery and storage of freight, find no support in the James case, as they are specific and precise in their provisions and do not content themselves with adopting the common law rule of reasonableness, but make "an addition to the duty" of the carrier which it would not "owe in the absence of such a statute."

It is hardly necessary to cite authority to show the marked difference between requirements of the common law rule of reasonableness and any rigid, precise rule of a statute.

A good illustration is the recent case of Mauldin vs. Seaboard Air Line Railway, decided by the Supreme Court of South Carolina Nov. 14, 1905, Advance Sheets South Carolina Reporter Vol. 73 No. 1 page 9-14.

"Where there is a sudden and unusual press of business, arising from exceptional causes, and which the company could not reasonably be expected to have anticipated, it is not liable for the delay thereby necessitated, unless it had specially contracted to furnish such transportation; it is bound to provide facilities for such transportation only as might reasonably have been anticipated."

Mauldin vs. Seabord Air Line Ry. 73 S. C., No.1 Adv. Shts. 9-14.

The South Carolina Supreme Court cites numerous authorities to sustain this rule.

This court has never disturbed its rulings in the Wabash case and while some State statutes indirectly affecting interstate commerce have been sustained it will be found that they in no way conflict with or modify the doctrine laid down in the Wabash case, to wit, that no State can regulate or fix "rules for prices, for modes of transfer, for times and modes of delivery," of interstate traffic (118 U. S., 557, 572). This will more clearly appear by reference to some of the cases decided by this court sustaining certain State statutes.

Animals having contagious diseases may be excluded from a State.

M. K. & T. R. Co. vs. Haber, 169 U. S. 613.
Reid vs. Colorado, 187 U. S. 137.

A law requiring the erection of fences and cattle guards has been upheld.

Missouri Pac. R. C. vs. Humes, 115 U. S. 512.
M. & St. L. R. Co. vs. Beckwith, 129 U. S. 26.
M. & St. L. R. Co. vs. Emmons, 149 U. S. 364.

A State law requiring engineers operating passenger and freight trains to have their sight examined was sustained.

Smith vs. Alabama, 124 U. S. 465.

A law prohibiting the consolidation of parallel or competing lines has been upheld.

L. & N. R. Co. vs. Kentucky, 161 U. S. 677.

A law separating the white and colored races has been upheld.

L. N. O. & T. P. Ry. Co. vs. Mississippi, 133 U. S. 587.

Plessy vs. Ferguson, 163 U. S. 537.

A law prohibiting the running of freight trains on Sunday was sustained.

Hennington vs. Georgia, 163 U. S. 299.

It may be well to state here in reference to the Hennington case that Justices Brewer, White, Peckham and Shiras have placed themselves on record in a dissenting opinion that they considered the Hennington case erroneously decided.

L. S. & M. S. Ry. Co. vs. Ohio, 173 U. S., 285, 325.

A statute forbidding the use of stoves as means of heating cars has been upheld.

N. Y. N. H. & H. R. R. vs. New York, 165 U. S. 628.

A law requiring trains to stop at county seats has been upheld.

Gladson vs. Minnesota, 166 U. S. 427.

A law requiring a carrier to inform the shipper that a loss has not happened on its line has been upheld.

Railroad Company vs. Patterson, 169 U. S. 311.

A law requiring bills of lading to be signed by both parties has been upheld, as a rule of evidence.

Railroad Co. vs. Patterson, 169 U. S. 311.

A law requiring a railroad company to stop three trains each way at cities containing 3,000 inhabitants has been upheld.

L. S. & M. S. R. Co. vs. Ohio, 173 U. S. 285.

A law requiring a physical connection of tracks by two different railroads has been upheld.

Wisconsin, etc. R. Co. vs. Jacobson, 179 U. S. 287.

The foregoing are some of the cases which this court has decided from time to time wherein certain State statutes have been upheld as not interfering with interstate commerce. Every one of these cases, however, will be searched in vain for any language showing the slightest modification of the doctrine laid down in the Wabash case, and that doctrine remains firmly established to this day, namely, that no State can pass any law to regulate, fix or make "rules for prices, for modes of transfer, for times and modes of delivery" of interstate freight.

Hence the statute of North Carolina purporting to give the Corporation Commission the power to make rules for the delivery and storage of interstate freight is absolutely void under the doctrine laid down in the Wabash case and finds no support in the foregoing cases.

The following cases may be mentioned, although they do not deal with freight rates or the delivery of freight.

I. C. R. R. Co. vs. Illinois, 163 U. S. 142, where a statute of Illinois was declared void because it attempted to require an interstate express train from Chicago to New Orleans to go 3½ miles out of its way and deviate from its course so as to stop at Cairo, Ill.

Likewise a statute of Illinois requiring *all* passengers trains to stop at stations was held to be invalid as an unreasonable regulation of interstate commerce.

C. C. C. & St. L. R. Co. vs. Ill. 177 U. S. 514.

The following case is directly in point in view of the facts appearing in the case at bar.

The case of Central Stock Yards Co. vs. Louisville & Nashville R. R. Co. was an effort on the part of complainant to compel the Louisville & Nashville Railroad Co. to deliver cars of live stock at Central Stock Yards, near Louisville, Ky. This claim was made under the provisions of the Kentucky Constitution. It was held by the court that an attempt "to compel the cars and freight received from one State to be delivered to another at a particular place and in a particular way" was an interference with interstate commerce and the Constitution of Kentucky was impotent to produce any such result.

The language of Mr. Justice Day announcing the decision of the Circuit Court of Appeals for the Sixth Circuit is as follows:

> "It is further alleged that the duty of complying with the complainant's demand rests upon the defendant company because of the requirements of the constitution of the State of Kentucky and the laws passed in pursuance thereof. Assuming, without deciding, that the Kentucky constitution and legislation require the defendant company to receive, deliver, transport and transfer freight to any point that is in physical connection with the tracks of another company, so that the complainant has, as to traffic originating in Kentucky, the right to require that the shipment be received and transported in accordance with the prayer of the bill, the question remains, have the Kentucky constitution and statutes any operation beyond the limits of that State? The interstate commerce clause of the Federal constitution has given rise to much litigation and frequent construction by the Supreme Court. It is thoroughly settled that the power of Congress to regulate commerce is plenary, and no State has

the right to regulate purely interstate commerce. On the other hand, the State has the right to make provisions as to matters within its own boundaries intended as aids to commerce, not thereby regulating interstate traffic. Without undertaking to reconcile or consider the numerous decisions, we may refer to Mobile Co. vs. Kimball, 102 U. S., 691; 26 L. Ed. 238. Mr. Justice Field, with his usual clearness, has called attention to the sound rules of construction to determine what is and what is not within the power of a State:

'Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce, as strictly defined, and its local aids or instruments or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Page 702, 102 U. S.; 26 L. Ed. 238.'

"It is within the power of a State to require connecting tracks between two railroad companies at an intersection for the transfer of cars used in the local business of such lines of railroad. This may have been necessary for the accommodation of State commerce. Railroad Co. vs. Jacobson, 179 U. S., 287; 21 Sup. Ct. 115; 45 L. Ed., 194. So it is competent for a State to require a railroad company to stop a certain number of trains each day at stations having a certain number of inhabitants, within the State. Such regulations do not interfere with the delivery or transportation of passengers traveling between States in such wise as to be reg-

ulations affecting interstate traffic. The statute simply amounted to requiring three trains of the company to stop at the station named each day. Lake Shore & M. S. R. Co. vs. Ohio, 173 U. S., 285; 19 Sup. Ct. 465; 43 L. Ed., 702. Likewise a State may require a telegraph company to deliver a message. Telegraph Co. vs. James, 162 U. S., 650; 16 Sup. Ct. 934; 40 L. Ed., 1105. But it is thoroughly well settled that a State may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between States. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. *It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one State to be delivered to another at a particular place and in a particular way. If the Kentucky constitution could be given any such construction, it would follow it could regulate interstate commerce. This it can not do.*" (Italics ours).
118 F. R., 113, 119-120.

This decision was affirmed in the case of Central Stock Yards Co. vs. Louisville & Nashville R. Co., 192 U. S. 568.

It is proper to remark that the Supreme Court did not think it necessary to decide the point as to whether or not the section of the Kentucky constitution was inapplicable to interstate commerce. Nevertheless, the opinion of the Circuit Court of Appeals was affirmed and we take the position here that so much of said opinion of the Circuit Court of Appeals for the Sixth Circuit in said case as dealt with the question of the Kentucky constitution interfering with interstate commerce is sound, and comes directly within the ruling of this court in the Wabash case.

This brings us to the second ground upon which Southern Railway Company contends that the order of North Carolina Corporation Commission requiring it to place said four cars of interstate coal is invalid, namely, because Congress has already legislated upon this very subject of the charges for the delivery of interstate freight.

We have already seen that the Act to Regulate Commerce (U. S. Stat. at L., vol. 24, p. 379) and its amendments apply to

> "the transportation of passengers or property . . . from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country."
>
> (Sec. 1. Act to Regulate Commerce, U. S. Stat. at L., vol. 24, p. 379.)

Section 1 of said Act also provides:

> "All *charges* made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or *for the receiving, delivering, storage, or handling of such property*, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." (Italics ours.)
>
> 24 U. S. Stat., at L., 379.

It is clear therefore that Congress in the matter of interstate shipments has passed a statute, regulating the "receiving, delivering, storage or handling of such property." That is to say, property which has been shipped from one State into another State. This being the case, no State can in any way regulate such charges, inasmuch as it has been frequently determined by the United States Supreme Court that when Congress passes a law affecting Interstate Com-

merce, such law is exclusive of all State statutes or State regulations purporting to govern or affect the same subject-matter, and the latter are void.

At pages 288, 289, 290 and 291, printed transcript of record, are set forth certain rules of North Carolina Corporation Commission, entitled

> "Storage and Demurrage Rules---Time Limit for placing of cars and delivery of freight—local transfer and switching charges."

Rule 1 provides: "No storage or demurrage *charges*" shall be allowed except after certain notices have been issued by the railway companies.

Rule 2 provides for "storage" of certain kinds of freight and that "48 hours" shall be allowed for unloading same and fixes the charges which may be imposed by a carrier for such storage, to wit, "not more than one dollar per day."

Rule 3 makes similar provisions as to the storage of "carload freight" and permits "72 hours" for the unloading of certain kinds of freight, such as fertilizers, brick, coal, coke, etc.

Rule 6 gives special privileges to consignees living more than five miles from a depot and provides that such consignees shall have all the time necessary to unload freight after the receipt of notice of its arrival, the only obligation upon their part being "the exercise of due diligence." The railroad company, however, is granted the privilege of not holding cars longer than five days for such consignees without the imposition of demurrage charges.

Rule 8 provides that a consignee shall have a right to collect one dollar per day from a railway company in the event it fails to place loaded cars at an accessible place for unloading within 48 hours computed from seven o'clock a. m. the day after arrival of same.

Rule 10 requires shipments to be moved by a railway company at certain rates of speed specified in the rule.

Rule 13 provides for switching charges.

We will not consume time giving a synopsis of the other rules.

These rules were passed by the North Carolina Corporation Commission, pursuant to the Statutes of North Carolina, set forth in Section 12 of the answer of the Corporation Commission (printed transcript, p. 20) authorizing said Corporation Commission

> "to make rules governing railroad companies in the placing of cars for loading and unloading, and in fixing time limits for the delivery of freights after the same have been received by the transportation companies for shipment."

In the case at bar, the North Carolina Corporation Commission has attempted to apply said rules to the four cars of coal in question, the same being interstate commerce.

Thus they have attempted to substitute State rules and regulations in the place and stead of the rules and regulations expressly enacted by Congress to govern interstate traffic and the "receiving, delivery, storage or handling" of same (U. S. Stat. at L., vol. 24, p. 379).

The Act of Congress requires all charges for the "receiving, delivery storage or handling" of interstate freight to be "reasonable."

If the State of North Carolina can provide a charge of one dollar per car, it has the right to provide a charge of five dollars per car or ten dollars per car, as the case may be, in lieu and instead of a reasonable charge provided by the act of Congress.

Other States would have a similar right to regulate the charges for delivering interstate commerce. Southern Railway Company passes through ten States, to wit, Vir-

ginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi Tennessee, Kentucky, Indiana and Illinois, and has trackage rights in three other States. Each one of these States could make different and perhaps conflicting regulations on this subject, if there is any power in the State at all to make and apply such regulations as to interstate commerce. But as we have already noted, Congress has acted upon this very subject, and all State legislation thereon is absolutely void.

The Supreme Court of the United States has passed upon this precise question:

> "*The Statute of Texas imposing a penalty for failure to deliver goods* on tender of the rate named in a bill of lading is not applicable to interstate shipments, the State Statute must yield to the Interstate Commerce Act, which prescribes the published tariff rate as the rule of compensation in such cases."
>
> "Laws resting upon the police power of the State must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter." (Italics ours)
>
> Gulf C. & S. F. R. Co. vs. Hefley & Lewis, 158 U. S., page 98; 39 L. Ed., 910.

In the Hefley case there had been an effort on the part of the complainants to enforce a statute of Texas in reference to a rate to be charged.

After full argument, the Supreme Court held that the Statute of Texas would have to give way before the Act of Congress, inasmuch as the latter had regulated the precise subject in question.

We have already seen that the same Act of Congress expressly covers charges for the "storage or handling" of Interstate Commerce, and therefore any rule, order or regulation of the State Corporation Commission of North Carolina, or any statutes of said State, purporting to affect

the "storage or handling" of interstate commerce must give way before the Commerce Act.

The same rule was laid down in the case of L. & N. R. R. vs. Eubank, 184 U. S., 27, 46 L. Ed., 416, that is to say, that the Interstate Commerce Act occupies the field exclusively, and all State legislation must give way before it. In that case a provision of the Constitution of Kentucky was held to have no application to Interstate Commerce, and was set aside. In other words, it is well settled that any article of trade moving from one State into another or crossing a State becomes and is an article of Interstate Commerce, and as such it is absolutely free from any State regulation or control whatsoever, and so remains until delivery to consignee and until the original package is broken.

In the case of I. C. C. vs. D. G. H. & M. Railway Company, 167 U. S., 633, this court held that the Act to Regulate Commerce applied to charges for cartage used by railways in the "delivery" of interstate freight, and held that Section 6 of the Interstate Commerce Act required the publication of charges for cartage or the publication of the fact that free cartage was allowed in reference to interstate freight. In other words, that the Act to Regulate Commerce covers and applies to terminal charges.

In the case of I. C. C. vs. C. B. & Q. R. R. Co., 186 U. S., 320, this court held that a terminal charge of two dollars per car made for "delivery at stockyards" of interstate was covered and governed by the Act to Regulate Commerce.

The case of Central Stockyards Company vs. L. & N. R. Company, 118 F. R., 113, Circuit Court of Appeals, 6th Circuit, opinion announced by Mr. Justice Day, is directly in point on this branch of the case at bar, and it was there held by Mr. Justice Day that the Constitution of Kentucky was impotent to regulate interstate commerce and could not

"compel the cars and freight received from one State to be delivered to another at a particular place and in a particular way."

118 F. R., 113, 120.

This language is directly applicable to the attempt of the defendants in this case, McNeill, Rogers and Beddingfield, to require the delivery of four cars of interstate coal "at a particular place and in a particular way" (118 F. R., 120.) to wit, the delivery of same on the private siding or spur track of the Greensboro Ice and Coal Company.

As has been already stated, this case was affirmed by this court in Central Stockyards Company vs. L. & N. R. R. Co., 192 U. S., 568.

There are numerous cases in which the Interstate Commerce Commission has applied the Act to Regulate Commerce to storage, delivery and terminal charges.

In the case of John Blackman, jr. vs. Southern Railway Company, 10 I. C. R., 352, the subject of storage charges on interstate traffic remaining in depots was investigated by the Interstate Commerce Commission, and it was held that said storage rates and regulations must be published in accordance with the Act to Regulate Commerce.

It was also held by the Commission that the Commerce Act covers demurrage, storage, terminal charges, and the distribution of cars, in so far as ~~extensive~~ interstate freight is concerned, in the following cases:

Riddle, et al, vs. Pittsburg & L. E. R. R. Co., 1 I. C. R., 688.

Riddle vs. N. Y., L. E. & W. R. R. Co., 1 I. C. R., 787.

Heck vs. R. R. Co., 1 I. C. R., 775.

Cutting vs. F. R. & N. Co., 1 I. C. R., 294.

Rice et al, vs. Western N. Y. & Penna. R. R., 3 I. C. R., 162.

Independent Refiners' Association vs. W. N. Y. & P. R. R. Co., 4 I. C. R. 162.

Cattle Raisers' Association vs. Fort Worth & D. C. Ry. Co., et al, 7 I. C. R., 513.

American Warehousemen's Association vs. Ill. Central R. Co., 7 I. C. R., 556-592.

Pennsylvania Millers' State Association vs. P. & R. Ry. Co., et al, 8 I. C. R., 531-553-558.

Palmer's Dock H. & P. Board of Trade vs. Penn. R. R. Co., 9 I. C. R., 61

The Circuit Court of Appeals for the Fourth Circuit announced an opinion February 6, 1906, in the case of U. S. ex. rel. Greenbriar Coal & Coke Company ys. Norfolk & Western Railway Company.

See Pamphlet opinion, Appendix C to this brief.

In this case the Circuit Court of Appeals has decided that the Act to Regulate Commerce, as amended, applies to undue discrimination in the distribution of cars, and ordered a mandamus to issue to prevent said undue discrimination.

The Court of Civil Appeals of Texas has passed upon the precise point now under discussion.

> "The power of Congress to regulate interstate commerce extends to the necessary switching of cars and delivery at terminal points; and an action to recover penalties imposed by a state statute upon carriers for discrimination between individuals in regard to terminal facilities can not be maintained with respect to freight brought from another state, as that matter is covered by a federal statute."
>
> Fielder vs. Missouri, K. & T. Ry. Co., of Texas, 42 S. W., 362.

The case of Fielder vs. M. K. & T. R. Co., 42 S. W., 362, was decided by the Court of Civil Appeals of Texas, and is on all fours with the case at bar. We therefore quote somewhat fully from the opinion. In that case Fielder, a coal merchant at Sherman, Tex., brought suit

under the Texas statute for 455 penalties of $500 each, alleging that the railway company declined to place cars of coal upon his private siding, "and the cars containing appellant's coal left on appellee's general unloading tracks, at a distance of 200 yards from appellant's bins, necessitating drayage and extra handling."

The railway company claimed as an excuse for refusing to place appellant's cars that he owed it three dollars demurrage on two certain cars, and that it had a rule to the effect that when a consignee refused to pay demurrage on a car it would decline to place any subsequent cars at the bins of such consignee until any such previous demurrage should be paid. The railway company also took the position that, inasmuch as the coal was all purchased in Indian Territory and transported in one continuous uninterrupted journey to Sherman, Tex., the coal remaining in the cars undelivered was interstate commerce and not subject to the laws of Texas providing penalties for the refusal to deliver cars.

The trial court declined to submit to the jury the issue as to penalties on the ground that the Texas statute had no application to interstate commerce. From this ruling Fielder appealed. The judgment of the trial court was affirmed, the Court of Civil Appeals of Texas using the following language:

> "We do not understand from the manner in which the plaintiff has presented questions to this court for revision that he complains of the judgment in his favor for actual damages; but his grounds of complaint are based upon the action of the court in refusing to entertain and hear and submit to the jury that branch of the case which sought to recover penalties for the alleged discrimination. The court, after hearing the evidence as to the character of the shipments in question, came to the conclusion that the shipments were

interstate, and that the state statute relating to the recovery of penalties, upon which plaintiff based his cause of action on this branch of the case, did not apply, and in effect ruled that, as the shipments were concerning matters of interstate commerce, no issue as to that branch of the case would be submitted. In our opinion, as stated in our conclusions of fact, the shipments in question related to interstate commerce. The fact that the shipments had reached the place of destination would not necessarily destroy the interstate character of the shipments. The right of Congress to control interstate commerce is not solely limited while the commerce is in actual transportation, but extends to and includes the necessary handling and delivery of that commerce at terminal points. It is as much necessary to the interest of interstate commerce and the uniformity of rule that should apply to transportation of that character of commerce, which is one of the objects intended to be accomplished by reserving this power solely to Congress, that it should retain control and dominion over the shipments at the beginning and terminal points, as well as during the actual transportation of the commerce. The plaintiff's cause, on that branch of it which seeks to recover penalties, is upon the theory that the duty of the carrier had not ceased when the coal actually arrived at Sherman, but that the carrier still, as a part of its duty connected with the delivery of the articles shipped, should do something more with the shipment; that is, place it in the actual possession of the plaintiff on his spur tracks leading to his coal bins. The fact that the assertion is made that there was a failure of duty in this respect confessedly admits that the dominion and control of the carrier over the shipment had not ceased, and that, by reason of its duty as a carrier, there was incumbent upon it something further to be done in order to make the delivery perfect, and to finally end and terminate the shipment. In effect, the position assumed by the plaintiff upon this branch of the case as the basis for his cause of action in the recovery of penalties confessedly admits that

the transportation had not in law ceased. Therefore, in our view of this question, these shipments being matters of interstate commerce, there was no error in the court in eliminating this branch of the case from consideration, and in refusing to apply the state statute to these shipments. There are cases which, in effect, hold that state regulations with reference to some matters of interstate commerce may be enforced where Congress has not acted in that particular upon such shipments; but that rule can not be invoked in this case, for there was in existence, at the time that the state statute was passed under which plaintiff seeks to recover the penalties, an almost identical and similar statute of Congress, relating to the same subject, and prescribing penalties for failure to observe the requirements of the statute. In view of the ruling that we make upon this branch of the case, and in view of the fact that plaintiff is not complaining as to the judgment in his favor on the issue of actual damages, we deem it unnecessary to pass upon the other question raised; for, if we are correct in the position we have taken in denying plaintiff any recovery for the penalties, and as the subsequent questions raised, in the main, relate to that branch of the case, it is unnecessary that we should notice them. The judgment is affirmed."

Fielder vs. M. K. & T. Ry. Co., of Texas, 42 S. W., 362, 364.

The foregoing authorities conclusively settle the point that Congress has passed a statute regulating the subject of the delivery of interstate freight, and that this statute occupies the field to the exclusion of all State regulation whatsoever.

Before leaving this question, however, we will discuss a case quoted by defendants below.

The case of Bagg vs. Wilmington, C. & A. R. Co., 109 N. C., 279 was cited by counsel for the Corporation Commission before the Circuit Court and will probably be relied upon here.

In that case the Supreme Court of North Carolina sustained a statute of the State giving a right of action for the recovery of a penalty where a railroad company allowed some freight to remain unshipped more than five days after receipt thereof.

It appeared that Bagg made a shipment from Wilmington, North Carolina, to a station in South Carolina. The statute was held not to be an interference with interstate commerce. The grounds assigned by the Supreme Court of North Carolina for holding that the statute applied to but did not interfere with interstate commerce would seem conclusively to show that if the case had been appealed to this court, it would have held that the statute was void as an interference with interstate commerce, both on the ground that the subject is exclusively within the jurisdiction of Congress, and also on the ground that Congress has actually legislated.

The court expressly says that the design of the statute was to prevent a railway company from unduly discriminating in furnishing cars to States other than North Carolina, while not furnishing sufficient equipment in North Carolina. The court puts an imaginary case and supposes that a railroad company might be interested in developing the trucking industry of South Carolina and Virginia as against the trucking industry of North Carolina, and that cars might be furnished to South Carolina and Virginia, at the same time being withheld from North Carolina, and gives the following reasons for its decision:

> "Therefore if the defendant company, whose line extends into the section of our State where many farmers are engaged in raising vegetables for sale in northern cities, should, for the purpose of stimulating production in a State further south, and more remote from the markets, fail to furnish transportation to this class of persons known as 'truckers' for more

than five days, and thereby give to the planters of South Carolina the exclusive benefits of the markets till vegetables of the same kind then mature here should ripen in Virginia, the producers would suffer loss without adequate remedy, because no provision is made in any national law for preventing such secret preference."

109 N. C., 279, 285; 14 S. E. 79, 81.

The Supreme Court of North Carolina expressly bases its decision upon the ground that the law was calculated to prevent discrimination in the furnishing of equipment in favor of South Carolina and Virginia as against North Carolina. In other words, the object of the statute was to prevent discrimination as to furnishing cars for and promptly moving interstate freight.

The court goes on to say that the Act to Regulate Commerce of 1887, makes no provision in the premises supposed. This is an error as we have already pointed out.

The Act of March 2, 1889 (25 U. S. Stat. at Large 855), and the Elkins Act of February 19th, 1903, (32 U. S. Stat. L. 847) expressly apply, as has been recently decided by the Circuit Court of Appeals for the Fourth Circuit (See case of U. S. ex rel. Coal Co. vs. N. & R. R. decided Feb. 6, 1906, Pamphlet opinion.)

Furthermore, it is stated by the court in the Bagg case that it "is undoubtedly true that under the North Carolina statute carriers would be compelled to regulate the distribution of their equipment in other States with reference to this statute and that under the force of the North Carolina statute carriers might be compelled to withdraw equipment from other States in order to comply with the North Carolina statute, and thus impair their facilities for doing business in other States, and thus be obliged to conduct their business in other States with reference to the statute of North Carolina.

The remedy suggested by the court is that similar statutes should be enacted in other States.

In the course of its opinion, the Court said, p. 288:

> "Where these arteries of trade have termini in different States, or where they are entirely within a single State, but constitute a part of a long through line formed for the purpose of competing for business with other similar lines, it would be as certainly impossible to interfere in any way with any branch of the system, whether located entirely within one or situate in two States, without to some extent affecting the whole line, as it would be to check the flow of blood in a vein of one's arm, or to temporarily open the vein without influencing the action of the main artery of that arm."

It thus being stated by the Supreme Court of North Carolina, in the Bagg case, that carriers must regulate and govern their business and conduct outside of the State and regulate and govern their equipment outside of the State with reference in some measure to this law of North Carolina, the statute falls directly within the language of this court in the case of Hall vs. De Cuir 95, U. S. 485, where a statute of Louisiana was condemned on the very ground that the carriers were obliged in some measure to regulate their conduct with reference to the laws of Louisiana.

This ruling was affirmed in the Wabash case 118 U. S. 557, and also in the case of L. & N. R. R. vs. Eubank 184 U. S., 27.

> "The facts in this case have been thus fully referred to for the purpose of showing how directly and also how injuriously such a provision might affect interstate commerce. Other cases may be supposed where the effect might not be so oppressive. *But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with*

some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress. (Italics ours.)

Louisville & N. R. Co. vs. Eubank, 184 U. S. 27, 40-41.

In a work entitled "Commerce Clause of the Federal Constitution," by E. P. Prentice and J. G. Egan the authors state, at pp. 182-3, that the Bagg case was erroneously decided.

XXIII.

The Orders of Defendants to Deliver Said Four Cars of Coal Directly Interfere With Interstate Commerce.

In the preceding sections of this argument enough has been said to show that the actual laying hold of the said four cars and practical seizure of same by the orders of defendants dated October 31, 1903 and December 10, 1903, was a direct interference with interstate commerce. Furthermore, this has been expressly held as a fact by the Circuit Court in its decree.

"It is further considered, ordered, adjusted and decreed * * * that said orders of said McNeill, Rogers and Beddingfield, dated October 31, 1903 and December 10, 1903, are void and repugnant to the Constitution and laws of the United States, and constitute a direct interference with interstate commerce."

Printed Transcript, p. 462.

The taking of said four cars of coal from the custody and control of Southern Railway Company and placing them upon the private siding and within the enclosure of Greensboro Ice & Coal Company, pursuant to the terms of said orders, unquestionably amounts to a trespass and direct interference with said cars of coal, the same being interstate commerce. In addition to this, both the Master and the court have held as a fact that:

> "Every day between the hours of 12 noon and 1:30 Southern Railway Company has arriving at Greensboro, North Carolina, seven mail trains and four trains carrying interstate freight. All of these trains arrive about the same time, and the Southern Railway Company was obliged to place a car on a certain siding at a certain time between these hours, under the orders and directions of a private shipper, or under the orders and directions of the North Carolina Corporation Commission, and, irrespective of its own reasonable rules and regulations, it would mean detention and delay and damages not only to interstate freight but to United States mail and passengers."
>
> Report of Master, Printed Transcript, p. 63.
> Decree of Court, Printed Transcript, p. 453.

Of course it is clear that if defendants McNeill, Rogers and Beddingfield have any power at all to order the delivery of an interstate car on a private siding, they can require this to be done in forty-eight minutes if they so elect and not in forty-eight hours, as happens to be the case in the present instance..

> Transcript of Record, p. 22.

It would be impossible for a railway company to conduct its business under such circumstances, and the conditions would be aggravated if every one of the ten States through

which the Southern Railway Company's lines run, as well as the three States in which it has trackage rights, could pass similar orders to enforce similar rules.

It is therefore patent that these orders in question not only directly interfere with the four cars of freight heretofore mentioned, but are calculated to interfere directly with other interstate commerce, express service and the United States mails. This leads us to a consideration of the question as to what rights railway companies have in reference to the making of reasonable rules and regulations for the conduct of their business.

XXIV.

Railroads Have Right to Make Reasonable Rules and Regulations for Conduct of Their Traffic in Their Own Interests and That of the Public.

The Circuit Court of Appeals for the 8th Circuit uses the following language:

> "A common carrier, however, is not bound by the rules of the common law to receive and carry commodities of any and every kind which may be offered to it, but only such as it makes a practice of transporting. It is entitled in the first instance to determine what class of commodities it will engage in carrying. Moreover, it is entitled, in the first instance, by the common law, to establish reasonable rules and regulations governing the manner and form in which it will receive such articles as it professes to carry, and providing how they shall be packed for shipment so that they may be handled and transported conveniently, safely and expeditiously. Hutchinson on Carriers pars. 111-113, and the cases there cited. This power to

make reasonable regulations with respect to the manner in which it will receive commodities for transportation implies the existence of a power on the part of a common carrier to change or modify such regulations from time to time upon reasonable notice to the public, as otherwise it might be compelled to pursue a particular practice of receiving goods, which it had once adopted, and was at the time attended with no inconvenience, after that practice had become exceedingly inconvenient and burdensome both to itself and the public."

Harp vs. Choctaw, O. & G. R. Co., 125 F. R. 445, 449-450.

In this case Harp, a coal dealer, at Hartford, Arkansas, brought suit against the Choctaw, Oklahoma & Gulf Railroad Company to recover damages alleged to have been caused by said Railroad Company changing its regulations as to the loading of coal, and thus destroying his business.

It seems that for sometime the said Harp had been allowed to load coal from wagons, but as the coal fields developed the Railroad Company declined to permit this, and only allowed coal to be loaded from the tracks running into the mines.

The facts were fully discussed by the Circuit Court of Appeals, and it was held that the Company had a right to change its former rules and regulations, provided the new rules and regulations were reasonable, and that the carrier could lawfully decline the continuance of the old method of loading.

The foregoing decision affirmed the opinion of the court in the same case below. (118 F. R., p. 169.) The following extract from the opinion of the court below in said case pointedly illustrates the necessity for permitting carriers to make reasonable rules and regulations in reference to the conduct of their business;—

"Was the company bound to accept it and transport it? Suppose a dozen different mine operators at Hartford, operating one hundred wagons for loading coal on cars, should demand of defendant that fifty cars a day be set out on its switches and side tracks in its yards at Hartford, to be loaded with coal from wagons. Is the company, under the law, compelled to grant the request? If so, the same thing may be done at every station for every person demanding it, and for every purpose, for coal has no imperial rights over lumber, cotton, stone, or merchandise; nor has the coal operator any rights superior to the lumber dealer, the cotton speculator, the operator of the marble quarry, the agriculturist. The common law made none. The statutes make none. All are to be treated alike. * * * The questions put therefore resolve themselves into this: Who shall have control of the operating road—the company or its customers? Who shall determine what the railroad will transport—the company or the shippers? Who shall say to what points the company will transport goods—the company or its customers? Who shall say what the means and methods of transportation shall be—the company or its customers? In short, who shall determine what the business of the company shall be and how it shall be carried on?

"Solved by the principles of the common law and common sense, it must be the company, as all will agree that no railroad could be operated at all by those who patronize it." (See 118 F. R., page 174.)

The same question was raised and was decided by the Circuit Court of Appeals for the Fourth Circuit in the case of Robinson vs. Baltimore & Ohio Railroad Company. The court in that case using the following language:

"Quite recently a case in all points similar to the case in hand was heard on appeal in the Eighth Circuit (Harp vs. Choctaw, O. & G. R. R. Co., 125 F. R., 445); and, in a careful opinion by Circuit Judge

Thayer, it was held that a railroad company had the right to make reasonable regulations, applicable alike to all shippers, as to the manner in which such a commodity as coal would be received for transportation, and could not be held answerable because it refused to receive coal hauled by wagons to the side tracks of a station, and that the power to make reasonable regulations as to the manner and place where the railroad would receive coal for shipment implied the power to change and modify such regulations from time to time upon reasonable notice to the public. We do not think it necessary to attempt to add anything to the reasoning and citation of authorities by which the ruling in that case is supported. The case of the appellants depends entirely upon their alleged right to compel the railroad company to receive the appellants' coal at Walker's Siding because other merchandise was received there. This right can not be sustained. It is not shown that the Belt Line, designated by the railroad company as the place where, on account of the large temporary increase in the shipment of coal, it would receive it, was an unreasonable place in any way. It was a more distant place for the appellants, but it may have been nearer to others. It is not shown that, under all the circumstances, it was not a reasonable provision for the transportation of coal at Fairmont.

"The case stated in the bill of complaint, and estabtablished by the depositions, was a most proper one for relief by injunction. The depositions showed that the persistent efforts of the appellants to block up the approaches to Walker's Siding with teams, which were kept there for the purpose of obstructing traffic, and the taking possession of cars intended for shippers of other merchandise, and the dumping of coal at the siding and station, had resulted during two days in suspending all freight business at the station, and threatened to continue idefinitely until the appellants had compelled submission to their demands. This amounted to a public nuisance, with immediate danger of irreparable mischief before the tardiness of

the law could suppress it. In such cases the jurisdiction of courts of equity to give more adequate and complete relief by injunction has been fully sustained. In re Debs, 158 U. S., 564, 587, 588, 596; 15 Sup. Ct. 900; 39 L. Ed., 1902."

Robinson et al, vs. Baltimore & O. R. Co., 129 F. R. 753, 755-756.

In this case the Baltimore & Ohio Railroad Company declined to permit one Robinson to continue to load coal upon its cars at Walker's Siding in the City of Fairmont, Marion County, W. Va., and issued other rules and regulations providing for the loading of coal.

These rules were held to be reasonable by the Circuit Court of Appeals, and it upheld absolutely the right of a company to manage its business and make reasonable rules and regulations to govern same.

This court has likewise decided that carriers have a right to make reasonable rules and regulations for the management of their business and delivery of freight.

"But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the reciver to receive and deliver live stock from and to the appellees at their own stock yards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, *under such reasonable regulations as the railroad company might establish.*" (Italics ours).

Stock Yards Co. vs. Keith, 139 U. S., 128.

Again, in the case of Donovan vs. Pennsylvania Company, decided Nov. 27, 1905 at the present term, this court sustained the action of the Pennsylvania Company in making an exclusive contract giving exclusive access to its station in Chicago to a certain hack and cab company. The right of

railroads to make reasonable rules and regulations conducive to their own interest and that of the public was fully sustained in this case, the court using the following language:

> "Again, in Cherokee nation vs. Southern Kansas R. Co., 135 U. S. 641, 657; 34 L. Ed. 295, 302; 10 Sup. Ct. Rep. 965, 971: 'The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. It is because it is a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner in the mode prescribed by law.' To the same effect are United States vs. Trans-Missouri Freight Asso. 166 U. S. 290, 332; 41 L. Ed. 1007, 1024; 17 Sup. Ct. Rep. 540; Smyth vs. Ames, 169 U. S. 466, 544; 42 L. Ed. 819, 848; 18 Sup. Ct. Rep. 418; Lake Shore & M. S. R. Co. vs. Ohio, 173 U. S. 285, 301; 43 L. Ed. 702, 708; 19 Sup. Ct. Rep. 465. Necessarily, the same principles apply in reference to the use of the company's station house and depot grounds; for they are held in the same right as are its road, its locomotives, and other property or appliances employed in the transportation of passengers and freight, and must be devoted primarily to public use to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad as a highway.
>
> "It by no means follows, however, that the company may not establish such reasonable rules, in respect of the use of its property, as the public convenience and its interests may suggest, provided only that such rules are consistent with the ends for which the corporation was created, and not inconsistent with public regulations legally established for the conduct of its business. Although its functions are public in their nature, the

company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as incident to ownership, it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects."

Donovan vs. Pennsylvania Co. Decided Nov. 27, 1905. Adv. Sheets No. 3, January 1, 1906.

XXV.

The Right of Management is a Property Right Protected by the Fourteenth Amendment.

In the case of Lake Shore & Michigan Southern Railway Company vs. Smith, (173 U. S., 684,) this court held that the right of a railway company "to conduct and manage its own affairs" was a property right guaranteed to it by the Fourteenth Amendment of the Constitution of the United States. That this right can not be interfered with by a legislature except in exercise of its power to provide for the safety, health and convenience of the public and to prevent improper exactions or extortionate charges. In other words, it was laid down by this court, after full consideration, that a legislature could not interfere with the management of a railway company execpt in so far as the safety, health and convenience of the public warrants. In that case this court also took pains to point out that the term "convenience" did not include an invasion of the right of a railway company

> "to carry on and manage its concerns" . . . "as a matter of internal administration, and in regard to the details of its business, which it has the right to change at any moment."
> (173 U. S. 697.)

This case firmly fixes the doctrine that no legislation can supersede the president, vice president, general managers, superintendents, engineers, traffic officials and other officers and agents of railway companies charged by the owners with the conduct of the company's business, but that the power of the legislature is limited solely to the protection of the health, safety and convenience of the public, and that the term "convenience" is not to be construed into the right of the legislature to usurp the management of the company.

It is true that in that case the facts involved presented a question as to whether or not a State law, having provided for maximum rates, could go further and as a matter of alleged "convenience" make an exception to a general schedule of maximum passenger rates and provide for the sale of thousand-mile tickets good for married men and members of their families, at less than the ordinary rates fixed by the general schedule of a legislature. This court held that such a proceeding was in no sense a "convenience," when that term is properly understood, but that by such legislation "The affairs of the Company are in this way taken out of its own management" (173 U. S. 696-697) and is a "pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road." (173 U. S. 698.)

The important ruling of this court in that case was the recognition of the right of management inherent in the owners of railway property. This particular legislation of the State of Michigan was held to be an invasion of that right. The Supreme Court of Michigan had sustained the legislation on the ground that it was an act passed in pursuance of the police power of the State and for the "convenience" of the public.

Answering this contention, Mr. Justice Peckham speaks as follows:

> "The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined it would be more convenient if the right could be claimed without any compensation whatever."
>
> 173 U. S., p. 692.

So we say here that if the right of defendants McNeill, Rogers and Beddingfield to order cars placed on a private siding in a particular way, at a particular place and in a particular time, is to be classed as a "convenience" it would be "more convenient" for said defendants to supersede the President, Vice-Presidents, General Manager and Superintendents of Southern Railway Company and manage, direct and control the movement, distribution and placing of all its motive power and rolling stock.

This is "a matter of internal administration, and in regard to the details of its business, which it has the right to change at any moment" (173 U. S., p. 697) and which is beyond the power of the State legislature to invade.

It is respectfully urged that in the case at bar the action of defendants McNeill, Rogers and Beddingfield in setting aside the rules and regulations of the Southern Railway Company governing the delivery of interstate freight; in actually seizing upon and ordering the switching of a car from the tracks of the Southern Railway Company at Greensboro to the private yards of a consignee at said point, is an invasion of the right of the Southern Railway Company to manage and conduct its affairs.

It would be intolerable if a railway company should at any moment be subjected to orders by telegram from railway commissions to take cars out of trains at any points designated by said commissions and place them upon spur or side-tracks.

Such action would disarrange the entire schedules of the railway company throughout its system. It would demoralize the service and endanger the safe conduct and movement of the trains, increase the risk of collision and other accidents, and would supersede the authority of the officers, managers and superintendents of the company and practically usurp the management and control of the railway.

It would be impossible for any railway company to provide for the passing of trains at certain points on the line to insure the safety of the lives of the public committed to its care, and to otherwise discharge the grave and important duties it must perform.

This would be and is confiscation in its boldest form for entire control of the property is wrested from its owners and placed in the hands of Commissioners who have not invested one dollar in the railway.

XXVI.

The Car Service and Storage Rules of Southern Railway Company Are Reasonable, in Fact.

We have already seen that both the Master and the Circuit Court have held, as a matter of fact, that the rules of Southern Railway Company governing the delivery and storage of freight and the detention of cars are reasonable.

We respectfully refer the court to Appendix B of this brief, wherein are published in full decisions from nearly every court in the United States, upholding the reasonableness and propriety of car service rules similar to those adopted by Southern Railway Company in North Carolina. A perusal of those decisions will disclose that these rules are not made for the purposes of revenue, but for the purpose of facilitating and expediting the delivery of freight and the unloading of cars in the interest of the public as well as of the railways. This has also been found as a fact in the case at bar, both by the Master and the court. (Trans. 66-445.)

It has also been found as a fact in this case, both by the Master and the court, that by the operation of such rules the detention of cars throughout the United States has been reduced from an average of five days to one and a half days, and thus the practical effect is to increase the amount of railway equipment in the service of the public at large.

Inasmuch as defendants made the point below that a railway company should deliver cars and bring suit for the storage charges where a shipper has detained the cars beyond the time allowed by the rules and have complained of the alleged hardship imposed upon them by rules which require payment of demurrage or storage charges for detention of cars prior to the delivery of the freight, it may be well to point out that these questions have been passed upon in numerous cases. We refer to two where the precise question has been raised.

At page 96, Appendix B of this brief, will be found the Duckwall case, wherein it was held by the court that such a doctrine as is contended for by the defendants would destroy the efficiency of the rules.

In same case at page 98, Appendix B, the situation is likened to that where a passenger must yield to the conductor's claim of his fare, and afterwards raise any question which he may desire with the carrier, as it would be impracticable to permit a passenger to try with a conductor a claim of offset against the company, as this would be detrimental to the general interest of other members of the public, who would thus be subjected to delays and inconvenience.

The Supreme Court of Illinois made a similar ruling in a case which will be found at page 226 of Appendix B to this brief.

The observance of the car service rules of Southern Railway Company is of vital importance to its business. In fact, it could not conduct its business at all, nor could it fulfill its functions in serving the public promptly and efficiently, without the aid of these reasonable rules. The history of the adoption of these rules throughout the United States appears at large in the cases collected in Appendix B to this brief. At such great centers of trade as St. Louis and Chicago, instances were known prior to the adoption of the car service rules where brokers would order cars delivered and keep same standing on the side tracks until customers were found for the freight. After the patience of one railroad was exhausted, the cars would be shipped to another sidetrack of another railway and left standing unloaded for days. Meanwhile, other consignees and other shippers were clamoring for cars, which could not be furnished by the railways because they were detained by those shippers who neglected to unload, regardless of the rights of other members of the public. In order to do away with

this condition of affairs, the car service rules were adopted and have had the effect, which has been found by the Master and the court in this case, of reducing the detention of cars from an average of five days to one and a half days, much to the benefit of the shippers of the country.

The necessity for the rules is very cogently put by the Railroad and Warehouse Commission of the State of Missouri in a case decided June 3, 1901, involving a dispute arising in St. Louis. The said Commission used the following language:

> "The enforcement of the rule referred to is absolutely necessary for the prompt transaction of the business of the railroads terminating at St. Louis. If otherwise, any manufacturer or dealer could have cars consigned to them held indefinitely, awaiting such time as might best suit their convenience for delivery and unloading. Upon the prompt delivery and discharge of cars at destination depends in a great measure the very existence of any railroad handling a large traffic, and it is imperative that proper, reasonable rules, regarding this most important matter, should be made and enforced. The rule referred to is one of the most important governing the movement of cars after arrival at St. Louis, and certainly has had a very beneficial effect in improving car service and preventing blockades."
>
> Appendix B to this Brief, pp. 122-123.

This is in line with all the cases throughout the entire country, and it is a matter of the greatest public importance that such rules should be enforced in the estimation of the courts.

See Kentucky Wagon Mrg. Co. vs. O. & M. Ry. Co., 32 S. W., 595; 98 Ky., 152. Appendix B to this Brief, p. 22.

Miller & Co. vs. Ga. Ry. Co., 88 Ga., 563, 30 Am. St. Rep., 170; 15 S. E., 316. Appendix B. to this Brief, p. 8.

XXVII.

The Orders of Defendants are Void and Violate the Fourteenth Amendment to the Constitution of the United States Because They Attempt to Dispossess Southern Railway Company of Property Upon Which It Has a Lien For Unpaid Storage or Demurrage.

The next question of law common to all of said threatened suits, upon which Southern Railway Company would rely as a defence, is that said order of October 31, 1903, made by defendants McNeill, Rogers and Beddingfield is void because it contravenes Article XIV of the amendments to the Constitution of the United States; in that it would require Southern Railway Company to part with the possession of the freight upon which it has a lien for demurrage prior to the payment of said lien and would thus deprive Southern Railway Company of its property without due process of law.

On account of the wilful refusal of Greensboro Ice and Coal Company to unload said four cars of coal after they were placed upon said team tracks, demurrage charges accrued and Southern Railway Company had and has a lien upon said coal for said charges, which would be lost if said cars were delivered to said Greensboro Ice and Coal Company upon its private siding.

Both the Master and the Circuit Court have found as a fact that demurrage was due on said four cars of coal on October 31st, 1906, the date of defendant's order.

Report of Master, Printed Transcript of Record pp. 67-68
Decree of Court, " " " " pp. 456-457

In the case of the Wabash Railroad Company vs. William N. Pearce, 192, U. S. 179, it was determined that a carrier had a lien for duties which it had prepaid on certain freight

imported into the United States in addition to charges for actually transporting the goods, and the judgment of the St. Louis Court of Appeals was reversed, the Supreme Court stating:

> "The defendant should not, therefore, have been deprived of possession of the goods without a repayment of the duties."
>
> 192 U. S. 179, 189.

The court also adopted as part of its decision the following passage from Schouler on Bailments, page 544;

> "A common carrier, then, may usually retain particular goods by virtue of his lien right until the freight and charges due thereon for his whole transportation are paid or tendered him, and he can not be compelled to give them up sooner. This lien moreover extends to all proper freight and storage charges upon the goods throughout the whole of a continuous transit over successive lines; since the last carrier or final warehouseman may advance what was lawfully due his predecessors, and hold the property as security for his reimbursement."
>
> 192 U. S. 187.

This case is decisive as to the right of the carrier to retain the goods upon which it has a lien for storage or demurrage charges.

It is well established that when cars are detained by shippers after the transportation is ended, and the articles of freight are left on the cars, the carriers owning the cars have the right to collect charges by way of storage, and that they have a lien therefor.

> "While the Company, therefore, retained this property on board its cars, at its depot, on account of the

failure of the shipper to comply with the conditions precedent to its shipment, it occupied as to him the position of a warehouseman."

Dixon vs. Central of Georgia, 35 S. E., 369.
Appendix B to this Brief, p. ~~90~~ 101

"The fact that the goods were stored in its cars, instead of a warehouse, did not change the Company's position as a depository for hire."

Miller vs. Georgia Ry. Co., 88 Ga., 563; 15 S. E., 316.
Appendix B to this Brief, p. 8.

The United States Supreme Court has held that a railroad is liable as a warehouseman for goods in cars still subject to its order in the yard of a terminal company.

Huntting Elevator Company vs. Receiver of the Chicago, Peoria & St. Louis Railway Company, et al., 179 U. S., 415; 45 L. Ed., 256.

It is unnecessary to multiply authorities for the above position, as it is thoroughly settled by the State and Federal decisions that railroads have a right to collect compensation for freight remaining in cars after the transportation is ended, and that such a charge is made for storage. The service is in the nature of storage, and it is just and proper that, for the use of its property, in that way, a railroad company should collect compensation from a shipper or consignee. As was well said by Hon. Judge Van Wagenen, in the case of C. M. & St. P. Railroad Company vs. Pioneer Fuel Company (a suit brought to recover for the detention of cars);—

"When one person uses the property of another, after being notified that a charge will be made for the same, the law implies a contract to pay a reasonable sum for such use. This is an elementary principle and one of every day application in the courts. Any other

rule would be alike contrary to the fundamental principles of law and equity, and repulsive to the commonest sense of right and justice. It is not the policy of the law to give something for nothing. It is the policy of the law to require a reasonable compensation for every valuable thing obtained, or of which the complaining party has been deprived. Cases in which it has been held that a common carrier can make all necessary and reasonable rules for the speedy, safe and economical discharge of its important duties to the shipping public, are too numerous to require citation."

See Legal Decisions in Car Service cases, Appendix B to this Brief, p. 33.

There are cases without number in which the courts of the country have upheld the carriers in their right to impose and collect charges for the detention of cars, and it is settled in North Carolina that a railroad company may decline to deliver freight until demurrage or storage charges are paid.

The case of Latt-Martin Pump Co. vs. Southern Railway Co., decided by Catawba County Court, July, 1901, is directly in point. The case was heard before Judge Council and is reported as follows:

"This case involved the question of the right of carriers to enforce warehouse charges for storage of freight. Shipment of pump cylinders arrived at Hickory, N. C., June 27, 1900, consigned to plaintiff; notice was given on arrival of shipment, which was acknowledged, but for business reasons plaintiffs failed to remove said shipments until after forty-eight hours had expired, computed from noon day following date of arrival.

"They demanded delivery without payment of storage charges, and tendered payment of freight charges only; delivery was withheld and shipment replevied. Case was heard before trial justice, who decided in favor of plaintiffs, and defendants appealed. Case was called in Superior Court, July Term, 1901.

"Plaintiffs contended that defendants unlawfully detained property referred to in complaint for storage charges.

"Defendant admitted possession and detention of the property, but alleged that detention was lawful, and that it was subject to storage or warehouse charges under its rules.

"Under the evidence the court charged the jury that the possession was lawful, that the property was subject to the charges referred to, and that said rules were reasonable.

"Verdict for defendant. Judgment upon verdict."

Appendix B to this Brief, p. 125.

XXVIII.

Carrier is not Obliged to Receive or Deliver Freight at a Mere Switch Track. The Switch of Greensboro Ice and Coal Company Was Not Built Under Any Order of Corporation Commission or Any State Authority, Nor Was There Any Contract Requiring Such Delivery.

As a general proposition, a carrier is not obliged to receive or deliver freight at a mere switch track. It may insist upon receiving and delivering freight at its regular stations. This was definitely decided by the Supreme Court of the United States in the case of Charnock vs. Texas & P. R. Co., 194 U. S., 432, 437, 8:

> "Meekers was not a regular station; indeed, was not a station at all, but a mere switch track. The defendant was not obliged to receive freight there. It was, as said by the Court of Appeals, 'a country or plantation switch,' established and maintained for the ac-

commodation of the planters of the neighborhood. There was no agent or employee maintained there for the purpose of receiving or guarding freight, nor was there fire apparatus kept. Cars were only sent there when ordered, loaded by the shipper, and taken by the first passing freight train to the point of destination. This was the practice for years, and there is not a word of testimony that it was not adequate to the protection of the planters, as it was to their accommodation, or that it was, in their judgment, not a complete fulfilment of the duty of defendant. No circumstance is shown which demanded a change in the practice. There was no demand made by the plaintiff for a change. Whatever risk there was seems to have been accepted as a consideration for the convenience afforded. It is easy to understand that, if watchmen had been demanded of the defendant, it would have insisted upon the delivery of freight at its regular station at Le Compte, 2½ miles distant."

194 U. S., 437-438; 48 L. Ed., 1057, 1059.

It was contended by defendants in the court below that the corporation commission under the statutes of North Carolina can compel the building of a side track.

It is conclusive to say that it has not done so in this instance.

In this case Southern Railway Company takes the position that it has a right to refuse to deliver at any other point than its public stations and is under no obligation to deliver cars at any private siding or spur track.

As we have seen there is no statutory obligation upon Southern Railway Company to deliver on the private siding now in question because this siding was not built under the orders of the North Carolina Corporation Commission or any State authority.

Furthermore, we have seen that both the court and the Master have held that the implied contract for the use of this siding was and is terminable at the will and option of either party.

Report of Master, Printed Transcript of Record p. 70.
Decree of Court, " " " " pp. 458-459

A railway company is not a common carrier as to private sidings or spur tracks, and the State has no power to force a railroad company to deliver its cars thereon. In a recent case decided by the Supreme Court of Michigan, December 22, 1903, it was held that a railroad company was not a common carrier with reference to side tracks, and could refuse to put them in altogether, and might decline using them at its discretion. The court said:

> "Having the right to refuse altogether, they must have the right to refuse, except upon just such terms and conditions as they saw fit to require."
>
> Mann vs. Pere Marquette R. Co., 135 Mich., 210, 219; 97 N. W., p. 721, 724.

The court cited the following cases sustaining its position:

Coup vs. W. St. L. & P. Ry. Co., 56 Mich., 111; 22 N. W., 215; 56 Am. Rep., 374.

M. S. & N. I. R. Co. vs. McDonough, 21 Mich., 165, 193; 4 Am. Rep., 466.

L. S. & M. S. R. Co. vs. Perkins, 25 Mich., 329; 12 Am. Rep., 275.

Stephens vs. Railway Co., 109 Cal., 86; 41 Pac., 783; 29 L. R. A., 751; 50 Am. St. Rep., 17.

Hartford Fire Ins. Co. vs. Railway Co., 175 U. S. 91; 20 Sup. Ct., 33; 44 L. Ed., 84.

B. & O. Ry. Co. vs. Voight, 176 U. S., 498; 20 Sup., 385; 44 L. Ed., 560.

Quimby vs. Boston & Me. R. Co., 150 Mass., 365; 23 N. E., 205; 5 L. R. A., 846.

Russell vs. Pittsburg, etc., R. Co., 157 Ind., 305; 61 N. E., 678; 55 L. R. A., 253; 87 Am. St. Rep., 214.

In the orange routing case this court affirmed the general principle that when a carrier is not obliged to enter into a contract, if it does so, it can incorporate such terms as may be proper.

"It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier, and thus end its responsibility, and charge its local rate for the transportation. If it agrees to transport beyond its own line, it may do so by such line as it chooses. (Atchison etc., Co. vs. Denver etc., Co., 110 U. S., 667; Louisville & Nashville R. R. Co. vs. West Coast Naval Stores, etc., Co., 198 U. S., 483). This right has not been held to depend upon whether the original carrier agreed to be liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, it can do so upon such terms as it may agree upon, at least so long as they are reasonable and do not otherwise violate the law."

Southern Pac. Co., et. al., vs. I. C. C. Nos. 158-159-160-161-162, Decided February 26, 1906, Adv. Shts., p. 7.

The Circuit Court of Appeals for the Sixth Circuit has decided, in an opinion delivered by Judge Taft:

"A railroad company as a carrier is not bound, at common law, by the establishment and maintenance for any length of time of a switch connection of its main line with a private warehouse, forever to maintain it."

Said court also held:

"An agreement by a railroad company, with one owning land adjacent to its track, that if he would build a coal tipple and a trestle therefrom to its track, it would construct a switch thereon, and thereafter deliver coal to him there, does not contain an implication that the switch shall be perpetual."

Jones vs. Newport News & M. V. Co., 65 F. R., 736 (C. C. A., 6th Circ.)

A carrier may on reasonable notice change the practice of allowing coal to be loaded from wagons.

Harp vs. C. O. & G. R. Co., 125 F. R. 445 (C. C. A. Eighth Circuit).

Robinson vs. B. O. R. R. Co, 129 F. R. 752 (C. C. A.).

In the case of Mercantile Trust Co. vs. Columbus S. & H. R. Co., 90 F. R. 148, the receiver of said railroad had the side or spur track running into a coal mining property taken up and proposed to discontinue its use. The owners of the coal mine objected and sought to obtain an injunction to restrain the receiver from so acting.

In delivering the opinion of the Circuit Court, Taft, judge, used the following language:

"The question presented is whether a railraod company may discontinue switch or spur tracks built by it for the purpose of bringing business to its road, when the contract under which the spur was built contains no express obligation to continue its operation for a definite time or forever. The contract under which the spur track to the Coyle mine was built is averred in the petition, but I have not been able to find the original or a copy in the evidence. However this may be, the contract, as described in the amendment to the petition, does not contain any express stipulation by the railroad company that it will keep and operate its spur track for any definite time. This brings the case, in my judgment, in respect to both the Columbus & Eastern mine and the Coyle mine, within the decision of the Court of Appeals in the case of Jones vs. New-Port News and M. V. Co., 31 U. S. App. 92; 13 C. C. A. 95, and 65 Fed. 736. In that case the owner of the coal tipple, which was reached by a branch spur or switch from the main line of the railway, brought suit in damages against the railway company for

removing the switch. It appeared that the switch was laid by agreement, and that on the faith of the continuance of the switch the owner of the tipple had erected improvements and expended a considerable sum of money. The court held, that, in the absence of an express provision in the contract as to the time during which this switch was to be maintained, it was within the discretion of the company and its directors to remove it at any time, and that an obligation assumed by the company not to remove it for a certain number of years might be invalid, as against public policy, for the reason that the railroad company had no right to bind itself by stipulation with any individual which might interfere with the usefulness of the road to the public generally. It seems to me that the case at bar and the case cited are entirely analogous, and therefore that the receiver has the right to discontinue the spur or switch, and to take up the track from either the Columbus & Eastern mine or the Coyle mine to Redfield. Should the mine owner desire to reach the railroad, he may do so by building a spur track of his own. He can not compel the railroad company, or the receiver exercising its franchises for the time, to continue the operation of a spur or switch track at a loss, or when the operation of it can not be rendered safe except by the expenditure of a considerable sum of money. Both these circumstances appear to the satisfaction of the court, from the evidence, as the basis for the action of the receiver. The conclusion reached renders it unnecessary to consider whether the contract under which the side tracks were built ran with the land, so as to bind the grantees of the Columbus & Eastern Railroad Company. The injunction prayed is refused, and an order may be entered to this effect."

90 F. R. 148, 150-151.

In view of the fact that some of the above mentioned cases state that reasonable notice is required before

changing the practice as to a spur track, it must be borne in mind that the master and the court have both found as a matter of fact that Greensboro Ice and Coal Company well knew the terms and provisions of the rules of North Carolina Car Service Association, adopted by Southern Railway Company, and had done business under them for many years, and amongst the provisions of said rules known to said company was Section 2 of rule 2 providing as follows:

> "In case consignees or consignors refuse to pay, or unnecessarily defer, settlement of bills for car service charges, the railroad shall, upon notice to that effect from the manager, refuse to switch any cars for such consignees or consignors, until such charges are paid."
>
> Report of Master, Printed Transcript of Record, p. 66.
>
> Decree of court, Printed Transcript of Record, pp. 455-456.

In pursuance of this rule Southern Railway Company on October 12 notified Greensboro Ice and Coal Company that because the latter had declined to comply with car service regulations, Southern Railway Company would decline to switch any cars on the private siding of Greensboro Ice and Coal Company and would tender deliveries upon the tracks of the Company where the cars would be under the immediate supervision and control of the company.

Printed Transcript of Record 31.

Report of Master, Printed Transcript of Record 66-67.

Decree of court, Printed Transcript of Record 456.

Said four cars of coal arrived at Greensboro between the 8th of October and the 22d of October, 1903, from six to ten days after notice had been given.

Report of Master, Printed Transcript of Record 67.
Decree of Court, Printed Transcript of Record 456.

It has been held by the Supreme Court of Pennsylvania in the case of Pennsylvania R. R. vs. Midvale Steel Co. 201 Pa. St. 624 that these car service rules being known to shippers constitute a contract between the shipper and the railway company.

> "As a consignee of goods over plaintiff's railroad it impliedly contracted to submit to all reasonable rules for the regulation of shipments. That the shipper was not consulted in framing the rules does not affect their validity. There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying or rules for demurrage; as to the one, it can not exceed a lawful rate; as to the other, it can not exceed a reasonable charge. Within these bounds, it is presumed, in the interest of its stockholders and the public, to properly conduct its own business."
>
> Pennsylvania R. R. Co. vs. Midvale Steel Co., 201 Pa. St. 624, 631.
>
> Appendix B to this brief, pp. 126-129.

Hence it is clear that the Greensboro Ice and Coal Company in the case at bar had lawful and reasonable notice that cars would no longer be delivered upon its private siding and this was in strict accordance with the implied contract to which said Greensboro Ice and Coal Company was a party, when it undertook to ship freight to Greensboro with full knowledge of the rules and regulations of Southern Railway Company applying in the premises.

From the foregoing it is clear that Southern Railway Company was under no obligation to use said switch track either under the statutes of North Carolina or under any contract with Greensboro Ice and Coal Company.

It is needless to observe that even had there been a contract not determinable at will the Corporation Commission would hardly have jurisdiction to enforce specific performance of same.

XXIX.

Southern Railway Company has Provided Ample Facilities for Unloading Freight at Greensboro in the Shape of Public Team Tracks and Public Coal Chutes and Can Not be Compelled to Deliver at Private Sidings.

This subject has been discussed in the preceding section. In addition to what was there said Southern Railway Company, in view of the fact that it has established ample facilities for the receipt and delivery of freight at Greensboro in the shape of public team tracks and public coal chutes, takes the position that neither the State of North Carolina nor any of its officers has power to compel a railroad company to make connections or deliver freights except at its duly established depots, stations, and yards, and a railroad company is not bound to make delivery on private sidings.

In the case of Kentucky and Indiana Bridge Co. vs. L. & N. R. R., 37 F R, 567, the question was elaborately discussed, as to whether or not the Louisville & Nashville R. R. could be compelled to make new connections with the Bridge Co.'s tracks and whether after such connections were made the interchange and delivery of freight could be enforced.

This court through Mr. Justice Jackson, held, p. 621:

> "When railroad companies, in compliance with their charter obligations, have provided themselves with convenient, suitable and ample stations and depots for the accommodation of their business, the law imposes upon them no duty, either to the public or other railroad lines, of making new stations, yards or depots, even though such additional constructions might be for the convenience of the public or of other carriers."

It was also held in the same case that when a new railroad makes a physical connection with an old railroad that no interchange of freight or business connection could be compelled and that,

> "individual shippers or consignees of freight have no right to require the old company to receive or deliver their traffic at such point of connection."

In the case of the Central Stock Yards Co. vs. L. & N. R. R., 118 F. R., 113, an effort was made to require the Louisville and Nashville R. R. Co. to make delivery of stock at the point of connection of the rails of Southern Railway Co., near Louisville, so that same could be taken to "Central Stock Yards" into which the rails of Southern Railway Co. ran.

After full argument the Circuit Court of Appeals held, in an opinion announced by Mr. Justice Day:

> "Where a railroad company has, by building stock yards, or by contract with a stock yards company, made adequate provision for the discharge of its duty as a common carrier with respect to live stock shipped over its line to a city, it is not required by the common law to make delivery of stock consigned to such city to connecting roads for delivery at other stock yards therein."

The testimony showed that the Louisville & Nashville R. R. Co. already had stock yards of its own, known as the Bourbon Stock Yards and the facilities were ample.

It was also held in that case that:

> "A State is without power to compel a railroad company to transfer cars of live stock to a connecting road at a point of connection within the State, where the shipment was received in another State, and is therefore a subject of Interstate Commerce."

In the same case the court also held:

> "In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought *to compel the cars and freight received from one State to be delivered to another at a particular place, and in a particular way.* If the Kentucky Constitution could be given any such construction, it would follow it could regulate interstate commerce. This it can do." (P. 120, Italics ours).

Affirmed in Cent. Stock Yards Co. vs. L. & N. R. R., 192 U. S., 568.

This is precisely in point to show that the order of October 31, 1903, of defendants McNeill, Rogers, and Beddingfield is void.

In the case at bar, it appears that the Southern Railway Company has ample team tracks and a public chute for the discharge of coal at Greensboro and it therefore can not be forced to deliver on a private siding.

See also Harp vs. C. O. & G. Ry. Co., 118 F. R., 169.

Affirmed 125 F. R., 445 C. C. A. 8th Circuit.

Charnoch vs. Texas & P. R., 194 U. S., 432, 437.

XXX

The Right to Trade is a Qualified Right, and one Trader Can Not be Forced by Law so to Conduct His Business as to Insure Profit to Another Trader.

In the court below, Greensboro Ice & Coal Company seemed to consider that the Southern Railway Company was bound to deliver cars on its private siding, because otherwise the Greensboro Ice & Coal Company could not conduct its coal business at a profit.

The underlying idea in this position is that one trader, and especially if that trader be a railroad company, is bound by law so to conduct its affairs as to insure a profit to other traders.

We shall see that in the eye of the law the right to trade is not an absolute right but a qualified right, subject to the right of other citizens to do likewise.

We shall also see that in the eye of the law a railway company is merely a trader.

We shall also see that no trader is bound to conduct his business so as to insure profit to another trader.

In the case of Mogul Steamship Company vs. McGregor, 23 Q. B. D., 598, Lord Justice Fry said:

> "It was argued that the plaintiffs have a legal right to carry on their trade, and that to deprive them of that right by any means is wrong. But the right of the plaintiffs to trade is not an absolute right, but a qualified right—a right conditioned by the like right in the defendants and all Her Majesty's subjects, and a right therefore to trade subject to competition. Now, I know no limits to the right of competition in the defendants—I mean, no limits in law. I am not speaking of morals or good manners. To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts. Competition exists when two or more persons seek to possess or enjoy the same thing; it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition."
>
> Mogul Steamship Co. vs. McGregor, 23 Q. B. D., 598, 625-6.

That the right to trade is not an absolute right but a qualified right was also passed upon in the following cases:

Phipps vs. London & Northwestern Ry. Co. L. R. [1892], 2 Q. B. D. 229.

Allen vs. Flood Law Rep. [1898] App. Cases, 1.

Rickett, Smith & Co. vs. Midland Ry. Co., 9 Ry. and Canal Traffic Case, 107-112.

Hopkins vs. Great Northern Ry. Co., 2 Q. B. D., 224.

Hilton vs. Eckersley, 6. E. C. B. 47, 74.

Assurance Co. vs. Knott, L. R. 10, Ch. App. 142.

Macauley vs. Tierney 19 R. I., 255; 61 Am. State Reports, 770, 774.

Walker vs. Cronin, 107 Mass., 555, 564.

Additional authorities might be cited but these are sufficient.

An examination of the above cases will show not only that the right to trade is a qualified right but that each trader is permitted to promote his own interests as he best may. As stated by one of the English judges in the case of Allen vs. Flood pp. 26-27:

> "I am not aware of any authority for the proposition that the law recognizes a man's interest in his trade, profession or business as analogous to property in land or to a right created by contract.
>
> "To show that an interference with trade was actionable many cases were cited, and the Decoy cases, reported in 11 East, were referred to as containing the key to the supposed rule. But it is perfectly clear that no such proposition as that interference with the use of property for purposes of trade or profit would be actionable was intended to be laid down. * * * The interest in the trade which a man carries on may be described figuratively as his property or as an investment of his industry or skill, from which he is entitled to receive a return. But a man can not be said to have a right to that which no one is obliged to provide for him, namely, employment in his trade or business. It seems equally clear that he can not be said to have a right to the hope of such employment

In the same case the said judge said, p. 26:

> "The argument was that those who carry on trade and the skilled workmen whom they employ have an interest in their occupations, like the property in land or personalty. It was admitted to

be a right of a somewhat limited character. It was not disputed that it might be invaded in the course of fair competition, or by the operation of trade combinations, and that, as every man was free to conduct his own affairs as he pleased, he might refuse to employ, as had been done by the Glengall Company in this case. Further, it was conceded that advice not to make a contract might not be an actionable wrong. But the remnant of the supposed property in trade or occupation, which was left after these allowances, was said to be especially favored and protected by the law, and that to interfere with those engaged in trade or their workmen without just cause, that is, from any indirect motive, was an actionable tort. No authority was cited for this supposed rule. It seems strange that a principle affecting so materially every branch of trade should have hitherto remained dormant in the law, and should never have received authoritative definition."

Allen vs. Flood, Law Rep. (1898) App. Cases, 1, 26.

So much for the proposition that the right to trade is a qualified right, subject to the like right in every other trader to pursue his own interests as best he may.

That a railroad company is a trader has been expressly decided both in this country and in England. In the case of Rickett, Smith & Co. vs. Midland Ry. Co., 9th Railway & Canal Traffic Cases, 107, 112, Collins, J., says:

> "The railway companies are trading bodies who, in return for a monoply, or something like it, have been bound to accept certain statutory maxima beyond which their charges must not range. * * * But within these maxima, except so far as they have been further modified by the section we are now considering, they must be regarded merely as traders, entitled like other traders to push their business to the best advantage."

In the case of Interstate Commerce Commission vs. Alabama Midland Railway Company, 168 U. S., 144 173, this court cites with approval the following passage from an opinion announced by Mr. Justice Jackson on circuit:

> "The Act to Regulate Commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in *other trades* and pursuits." (Italics ours).
>
> I. C. C. vs. Alabama Midland, R. Co., 168 U. S., 144, 173.

The same passage was cited with approval by this court in the Orange Routing case.

> So. Pac. Ry. Co. et al. vs. I. C. C. decided by this court, Feb. 26, 1906; Oct. Term, 1905; Nos. 158, 159, 160, 161, 162.

There can be no doubt that railways are considered and adjudged by the courts, both in England and in this country, to be mere traders.

It is hardly necessary to cite authority to the point that one trader is not bound to conduct his business so as to insure profit to another trader, although this proposition is likewise sustained by the cases already cited, and we have a direct authority on the point in this country.

In the case of Whitwell vs. Continental Tobacco Co., 125 F. R., 454, decided by the Circuit Court of Appeals for the Eighth Circuit, wherein it was held by the court that a trader was not bound to sell his goods to another trader at a price upon which another could realize a profit by selling again to others. The court used the following language:

> "There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or a duty to, him. The damages from other acts or omissions form a part of that *damnum absque injuria* for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, *for the defendants owed him no duty to sell their products to him at any price—much less at prices so low that he could realize a profit by selling them again to others.* The complaint therefore fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants and the judgment below is affirmed." (Italics ours).
>
> Whitwell vs. Continental Tobacco Co., 125 Fed. Rep. 454, 463.

Similarly it is said in Pollock on Torts, 6th ed., p. 146:

> "To say that a man shall not seek profit in business at the expense of others is to say that he shall not do business at all, or that the whole constitution of society shall be altered. Short of a fundamental reconstruction of the commonwealth, the law must assume that 'free competition is worth more to society than it costs.' (O. W. Holmes, Jr., in Vegelahn vs. Guntner, 167 Mass. 92, 106.) * *
>
> "A classical illustration of the rule is given by a case in the Year Book of Henry IV, which has often been cited in modern books, and which is still perfectly good authority. Hil. 11 Hen. IV, 47, pl. 21. The action was trespass by two masters of the Grammar School of Gloucester against one who had set up a school in the same town, whereby the plaintiffs, having been wont to take forty pence a quarter for a child's schooling, now got only twelve pence. It was held that such an action could not be maintained. '*Damnum,*' said Hankford, J., 'may be *absque injuria,* as, if I have a mill and my neighbor build another mill, whereby the profit of my mill is diminished, I shall have no action against him, though it is damage to me * * * but if a miller disturbs the water from flowing to my mill, or doth any nuisance of the like sort, I shall have such action as the law gives.' "
>
> Pollock on Torts, 6th ed., p. 146-147, 148.

Of course a railway company is obliged to sell its product—transportation—to the public at reasonable rates, and in this respect differs from ordinary traders, but it is not bound to sell transportation, the article in which it trades, at prices so low as to insure a profit to other traders in their line of business.

That is to say, the law does not require a railway company to do this.

In fact the law, as settled in numerous cases by this court, holds that it would be confiscation for a State to pass a statute requiring a railway company to sell trans-

portation or give the use of its property to the public without just compensation or a fair return upon a fair value of its property.

This is the situation from the standpoint of the law.

As an economic problem, however, railway companies are obliged so to conduct their business that their patrons will prosper, and they can only prosper by conducting their business at a profit.

Nevertheless, the law does not undertake to force a railway to conduct its affairs so that other traders may carry on their particular line of business at a profit.

XXXI.

Proceedings Before North Carolina Corporation Commission Were Not Due Process of Law.

At page — of Appendix A to this brief are set forth "Rules of Practice in Cases and Proceeding Before the Court of the North Carolina Corporation Commission."

Without specifying in detail the provisions of these rules, upon inspection it will be found that they contain directions as to the forms and contents of complaints, etc., and the manner of service of papers upon defendants.

Rule 5 provides that parties defendant duly served with papers shall have ten days after such notice in which to answer.

It was admitted by Mr. McNeill, Chairman of the North Carolina Corporation Commission, that in the present proceeding these rules were not complied with. This was also found as a fact by the Master and the Court, the only complaint in this case being an informal letter from Greensboro Ice and Coal Company. Prior to the order of October 31,

1903, no witnesses were sworn and no investigation of facts was had in the ordinary methods pursued in a court of justice.

Report of Master, Printed Transcript of Record, p. 74.

Decree of Court, Printed Transcript of Record, pp. 460-461.

The order of October 31, 1903, was therefore made without notice to Southern Railway Company and without an opportunity given for it to be heard.

This proceeding illustrates the dangers of departing from the methods of investigating disputes and ascertaining the truth according to the procedure of courts in English speaking countries, which methods are the outgrowth of the wisdom of ages.

We venture to say in this connection that it is doubtful whether the new schools of thought will improve very greatly upon the system for settling disputes, ascertaining the truth, protecting the rights of life, liberty and property, which have prevailed for many centuries amongst English speaking people, for as Lord Erskine well said:

> "The wisdom of the law is greater than any man's wisdom."

Here we have a body of gentlemen clothed with a remarkable combination of powers. Amongst other things they are called a "Court of Record," and they have adopted rules of practice, yet, unlike other courts known to the law, they feel free to disregard and set at naught their own rules, something that even this court would not feel free to do with reference to its rules.

In the case of Rio Grande I. & C. Co. vs. Gildersleeve, 174 U. S., 603, this court adopted as its own the following language:

"As was said in Thompson vs. Hatch, 3 Pick.,512:
'A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and can not be dispensed with to suit the circumstances of any particular case. * * * The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it.'"

Rio Grande I. & C. Co. vs. Gildersleeve, 174 U. S., 603, 608-609.

It is, however, perhaps, only natural that confusion of thought and disregard of the principles of liberty and justice should spring from an attempt to carry into effect such a statute as that creating the North Carolina Corporation Commission. We shall see in the succeeding section of this brief that this statute combines in one body executive, legislative and judicial functions.

In the language of Chancellor Kent in Dash vs. Van Kleeck, 7 Johns 477, speaking of an act combining the exercise of legislative and judicial functions:

"It is a well settled axiom that the union of these two powers is tyranny."

7 Johns., 477.

It is not to be expected, therefore, that human nature is capable of administering such a statute without the commission of grave wrongs to life, liberty and property. However well intentioned a man may be, he is unequal to the task of being legislator, judge and executioner.

In the present case we have the spectacle of the North Carolina Corporation Commission first acting as counsel to

the complainant, Greensboro Ice and Coal Company, advising that company how to make its case; writing a letter dated October 26, 1903, as such counsel (Printed Transcript of Record, 298) recommending Greensboro Ice and Coal Company to pay the freight upon the four cars of coal in question, which said company had previously declined to do; giving its opinion to its client that the cars should be placed upon the private siding. Whereupon and on account of said advice from its counsel, Greensboro Ice and Coal Company immediately paid the freight. These are found to be the facts both by the Master and the court.

See Printed Transcript of Record, 298.
Master's Report, Printed Transcript of Record, p. 67.
Decree of Court, Printed Transcript of Record, p. 456.

We next find the Corporation Commission acting as Judge in the case, having its former client before it as plaintiff, and in disregard of its rules of practice passing an order dated October 31, 1903, as a court deciding the case in favor of the plaintiff, its former client.

This decision and order was made without hearing said defendant.

We next find the same body of gentlemen sending the following letter:

"Raleigh, N. C. Nov. 3, 1903.

"*Greensboro Ice and Coal Co., Greensboro, N. C.*

"GENTLEMEN: The Commission are in receipt of your telegram and I am directed to say that they will bring suit for penalties in regard to the failure to obey the order of the Commission as the law provides.

"Very respectfully yours,
(Signed) "H. C. BROWN, *Clerk.*"

Printed Transcript of Record, 117.

The above letter was written after Southern Railway Company had filed exceptions to the order or decision of the Corporation Commission of Oct. 31, 1903, said exceptions being dated Nov. 2, 1903.

See Exhibit A to answer of North Carolina Corporation Commission, Printed Transcript of Record, 23-24.

Said letter was also written prior to Nov. 12, 1903, the date which the same body of gentlemen fixed for hearing said exceptions.

Printed Transcript of Record 269.

None of the facts above stated are disputed and are found both by the master and the court.

Master's Report, printed Transcript of Record 73-74.

Decree of court, printed Transcript of Record, p. 461.

When we say that none of the above facts are disputed we do not forget that the defendants McNeill, Rogers and Beddingfield denied under oath in Section 10 of their answer (printed Transcript of Record 19) that they had threatened to bring suits for penalties to enforce their order, but it is evident that this letter of November 3, 1903 was unintentionally overlooked or forgotten by said defendants in the multitude of their many capacities as counsel, judge and prosecutor in the same case.

We have no doubt that these gentlemen, upon reflection, are as much shocked as anyone to find that they have acted as counsel in a case prior to the hearing; that they have acted as judges in the same case, and issued an order without notice to the defendant, pending the hearing of the exceptions before them as a court; that 9 days prior to the time set by themselves

for such hearing, on said exceptions, they write a letter, notifying the party complainant before them as a court, that it was their intention and that they had decided to bring suits for penalties to carry out the decision already announced by them as a court, which decision followed the line of their advice as counsel in the same case in the letter dated October 26, 1903, 5 days prior to the first announcement of the said decision.

The situation illustrates the utter impossibility of any body of men acting as legislators, judges and executioners in the same matter.

What could it avail Southern Railway Company or any other defendant to have a hearing on November 12, 1903 in reference to a matter about which the court had made up its mind in pursuance of its previous advice in the capacity of counsel, and also when prior to said hearing of November 12, 1903, to wit, on November 3, 1903, in pursuance of its capacity as prosecutor, it had notified the complainant in the case of its intention of instituting suits for penalties?

The proceedings we have above described are not due process of law.

In Windsor vs. McVeigh, 93 U. S. 274, where a party was notified but his answer stricken out before he could be heard, and a preconceived judgment of confiscation entered against him, this court said:

> "That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a sum-

mons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he was entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: Appear, and you shall be heard; and, when he has appeared, saying: Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence."

Windsor vs. McVeigh, 93 U. S., 274.

XXXII.

CROSS APPEAL.

Orders of Defendants void because Act Creating North Carolina Corporation Commission Confers Legislative, Executive and Judicial Functions Upon the Same Body Contrary to the Constitution of North Carolina and Contrary to the Constitution of the United States.

There is also a question of law common to all the said threatened suits upon which Southern Railway Company would rely at a defense therein, to wit: That the Act creating the North Carolina Corporation Commission, Chapter 164, Public Acts of North Carolina, 1899, and the amendments thereto, is unconstitutional and void, because it purports to create a court of record and also clothes said court of record with legislative and executive functions; that is to

say, it gives the North Carolina Corporation Commission the right and power to punish for contempt, to fix and make rates for railroad and telegraph companies, and to appoint bank examiners and other powers of a judicial, legislative and executive character.

It is not our purpose to make an exhaustive review of the authorities on this point.

The position taken here, however, is that the statute of North Carolina violates both the Constitution of North Carolina and the Constitution of the United States and is therefore void.

It is hardly necessary to cite authorities to the point that where the Federal Court has jurisdiction by virtue of diverse citizenship it can and will administer all remedies to which the complainant may be entitled under the State law. Therefore, Southern Railway Company in this suit has a right to invoke the Constitution of North Carolina and to show that the statute contravenes that Constitution as well as the Constitution of the United States. In Burgess vs. Seligman, 107 U. S., 20, the syllabus reads as follows:

> "The Federal Courts have an independent jurisdiction in the administration of State laws in cases between citizens of different States, co-ordinate with, and not subordinate to, that of the State courts; and are bound to exercise their own judgment as to the meaning and effect of those laws."
>
> 107 U. S., 20; 27 L. Ed., 359.

Again, in the same case:

> "But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt."
>
> 107 U. S., 20; 27 L. Ed., 359.

There will be no embarrassment in this suit for the reason that the highest court of North Carolina has, in a long line of decisions, uniformly held that the Constitution of North Carolina forbids the union of legislative, executive and judicial functions in the same body. We will cite these cases a little later.

Meanwhile, let us briefly examine the provisions of the Acts creating the North Carolina Corporation Commission, and conferring various powers upon them. These Acts are set out in full in Appendix A to this brief.

Section 1054 reads as follows:

> "There shall be a court of record, known as the 'Corporation Commission.' Such court shall adopt a seal, and shall have all of the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in this chapter. The members and clerk thereof may administer oaths."

Section 1067 gives the Corporation Commission power to compel the attendance of witnesses

> "and punish for contempt, as by law conferred upon the superior courts."

These sections undoubtedly confer judicial functions. The general power to punish for contempt is strictly judicial in its nature. In Kilbourn vs. Thompson, 103 U. S., 168, this court discussed the right of Congress to punish a witness for contempt in declining to answer certain questions put to him before a committee of the House. It was decided that Congress was without any general power to punish for contempt.

This court said:

> "We think it equally clear that the power asserted is judicial and that it is *not* legislative."
> 103 U. S., 168.

In the case just cited it was said that Congress might punish for contempt in certain specific instances involving its dignity arising out of matters wherein legislative investigations were concerned but this court emphatically laid down the proposition that the general power to punish for contempt was judicial in its nature.

It will be observed that the general power to punish for contempt is conferred upon North Carolina Corporation Commission by the statute in question.

In the case of In re Simms, 54 Kans., 1-4, the court said:

> "If the legislature may confer on the county attorney one of the highest and most distinctive attributes of judicial power, that of punishing for contempt, to aid him in ascertaining from witnesses the facts with reference to violations of law, might the legislature not also confer on any attorney the power to examine witnesses in civil cases in the same manner, and to commit them for contempt if they refuse to answer his questions?"
>
> In re Simms, 54 Kans., 1-4; 37 Pac., 135 cited 49 L. R. A., 669.

From the foregoing it is clear that the act creating North Carolina Corporation Commission clothes it with judicial functions. There are other judicial functions likewise conferred but we will not elaborate.

Section 1096 provides:

> "The Commission shall have power and are directed to make just and reasonable rates of charges for the transmission of messages by any telegraph or telephone company or corporation doing business in this State, and for the rental of telephones."

Section 1099 provides:

> "The Commission shall make reasonable and just rates:

1. Of freight, passenger and express tariffs for railroads, street railways, steamboats, canal and express companies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers."

The power to make rates is unquestionably a legislative function.

Munn vs. Ill., 94 U. S., 113-144.
Peik vs. R. R. Co., 94 U. S., 164-168.
R. R. Co. vs. Express Co., 117 U. S., 1.
R. R. Co. vs. Minn., 134 U. S., 418.
Reagan vs. Farmers L. & T. Co., 154 U. S., 362.
R. R. Co. vs. Gill, 156 U. S., 649.
R. R. Co. vs. I. C. C., 162 U. S., 184.
I. C. C. vs. R. R. Co., 167 U. S., 479.
I. C. C. vs. R. R. Co., 168 U. S., 144.

Numerous other legislative functions are conferred upon the Corporation Commission by these statutes, but we will not elaborate on same.

Section 1119 of said statute reads:

"The members of the Corporation Commission shall constitute a board of 'State Tax Commissioners,' with the powers and duties prescribed by law."

Powers are then conferred upon the Corporation Commission to supervise the assessment of taxation of property in the State of North Carolina, and in Section 1125 it is provided amongst other things that said Corporation Commission shall review assessments made by the inferior County officials, and

"In case said board, or the member thereof who shall act in said review, shall determine that the assessments so reviewed are not assessed according to law, he or they shall, in a column provided for that purpose, place opposite the true and lawful assessment of the same."

Assessment of property for taxation is an executive function.

County of Upshur vs. Rich, 135 U. S., 467.

The acts of North Carolina also clothes the Corporation Commission with large powers over banks.

Sections 246 to 251 give them authority to appoint bank examiners. These powers were formerly exercised by a State Treasurer and an Auditor of the State, and are executive, as expressly set forth in the Constitution of North Carolina.

Article 3 of the Constitution of North Carolina creates an "Executive Department." Section 1 reads:

> "The Executive Department shall consist of a Governor, in whom shall be vested the supreme executive power of the State, a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction and an Attorney-General, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly are elected." * * *

The laws of North Carolina creating the Corporation Commission confer additional executive functions upon said Commission but we have mentioned a sufficient number for the purposes of this argument by way of illustration.

There is no doubt therefore North Carolina Corporation Commission is amply clothed with judicial, legislative and executive functions.

In this situation we respectfully submit that the acts of the North Carolina Legislature creating said Corporation Commission are unconstitutional and void.

The Constitution of North Carolina provides that

> "the legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other."
>
> Article One, Section 8, Constitution of North Carolina.

Article 2, Section 1, of the Constitution of North Carolina creates a "Legislative Department" and states:

> "The legislative authority shall be vested in two distinct branches, both dependent on the people, to wit, a Senate and House of Representatives."

Article 4 of the Constitution of North Carolina creates a "Judicial Department," Section 2 reads:

> "The judicial power of the State shall be vested in a court for the trial of Impeachment, a Supreme Court, Superior Courts, Courts of Justices of the Peace, and such other courts inferior to the Supreme Court as may be established by law."

We have already set out Article 3 of the Constitution of North Carolina creating the executive department.

It will thus be noted that, in addition to the express provision of Section 8, Article 1 of the Constitution of North Carolina requiring the Executive, Judicial and Legislative Departments to be kept separate, that instrument proceeds to create separately each great department of the government; that is to say, the Legislative, Judicial and Executive.

The following decisions from the Supreme Court of North Carolina conclusively show that any legislation attempting to combine legislative, executive and judicial functions is void.

The case of Robinson vs. Barfield, 6 N. C. (2 Mur.), 391, at 419 and 420 (July Term, 1818) presents an instance of the attempted exercise of judicial power by the Legislature.

Under the Act of 1751 the deed of a *feme covert* without a private examination was null and void, and an Act of Assembly declaring that certain deeds, which were not so executed according to law, should be held, deemed and taken to be effectual, for the conveyance of the lands mentioned in them, was held unconstitutional, being in violation of the 4th Section of the Bill of Rights of Constitution of 1776, which is now 8th Section of the Constitution of 1868 and 1875), which declares the legislative, executive and supreme judicial powers to be forever separate.

Said Justice Daniel (speaking for the court composed of Chief Justice Taylor and Associates Ruffin, Hall, Sewall and Daniel, of whom Sewall, J., delivers a separate opinion).

> "Had the Legislature any right or power to take the lands without the consent of the lessors of the plaintiff, in whom the fee simple vested, and without compensation rendered, give them to General Thomas Brown and his heirs; or in other words, is the Act of the Assembly passed in the year 1788, confirming the title of Gen. Brown, of any force or effect? I am of the opinion, the act is a nullity, and does not affect the rights of the lessors of the plaintiff. The Constitution declares, that the legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other. The transfer of property from one individual, who is the owner, to another individual, is a *judicial* and not a *legislative* act. When the Legislature presumes to touch *private property*, for any other than public purposes, and then only in case of necessity, and rendering full compensation; it will behoove the judiciary to check its eccentric course, by refusing to give effect to such acts. Yes, let them remain as dead letters on the staute book. Our oath forbids us to execute them, as they would infringe upon the principles of the *Constitution*. Miserable would be the condition of the people, if the judiciary was bound to carry into execution every act of the Legislature, without regard to the paramount rule of the Constitution. This Government

is founded on checks and balances. The judiciary check the Legislature, when it strays beyond its constitutional orbit, by refusing to enforce its acts. The opinion of Sir Matthew Hale, that a statute is in the nature of a judgment may be law in England, but in this State, where the constitution has separated the legislative and judicial powers, courts can neither nibble at the legislative power nor can the Legislature stride over the judicial." Robinson vs. Barfield 6 N. C. (2 Mur.), 391, 419 and 420.

Hoke vs. Henderson, 15 N. C. (4 Dev. Law), 1, 12 and 13 (December Term, 1833), was where the Legislature passed a law transferring the office of Clerk of the Superior Court from one person to another, which the court held unconstitutional.

Said Chief Justice Ruffin, for the court (Chief Justice Thomas Ruffin and Associates, Joseph J. Daniel and William Gaston):

"By the fourth section it is declared, 'that the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other.'

"In absolute governments, whether hereditary or representative, the division of the powers of government is unimportant; because that body in which lies the superior authority can, at will, make it supreme and absorb all the other departments. It does not follow, therefore, that because the British Parliament, whose supremacy is acknowledged, decides questions of private right and puts that decision, as it does its other determinations, into the form of a statute, that whatever it does is legislative in its nature. It can adjudicate and often does substantially adjudicate when it professes to enact new laws. That faculty is expressly denied to our Legislature, as much as legislation is denied to our judiciary. Whenever an Act of Assembly, therefore, is a decision of titles between individuals, or classes of in-

dividuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right; which is not a legislative but a judicial function. It may not be easy to distinguish those powers and define each, so that an act shall be seen at once to be referable to the one or the other." Hoke vs. Henderson, 15 N. C. (4 Dev. Law), 1, 12 and 13.

(This case, so far as office being property, has been overruled in Mial vs. Ellington, 46 S. E., 961; 134 N. C., 131 but the principle as to the separation of the three departments is not affected by the last mentioned case.)

Houston vs. Bogle, 32 N. C. (10 Iredell Law) 496, 503 and 504 (December Term, 1849), presents a case where prior to the passage of the Act of 1840, Ch. 28, no voluntary conveyance of property, even to a child, could be upheld to defeat an existing creditor, if the debtor could find no other property out of which to make his debt, which law the Act of 1840, Ch. 28, changed by providing that no gift, by one indebted should be hereafter taken and held fraudulent and void in law, provided the debtor at the time retained sufficient property to satisfy his then existing creditors. The court held that the Act applied only to future conveyances and its application to prior voluntary conveyances would be unconstitutional, as it is not the province of the Legislature but of the judiciary to declare what the law was before the passage of any act.

Said Justice R. M. Pearson, speaking for the court (Chief Justice Thomas Ruffin and Associates Frederick Nash and R. M. Pearson):

"According to the reasoning in the opinion in Arnett vs. Wanett, 6 Ire., 41, by a proper construction of the statute, the word 'hereafter' refers to the decisions of the courts and not to gifts, and the Legislature intended to say, not only what the law should thereafter

be, but what *it had been before*. If such was the intention, it is an excess of authority, and it is null and of no effect. The right to *make* laws is vested in the General Assembly. The right to *decide* what the law is and what it was is vested in the Supreme Court. The assumption of a right by the 'legislative power' in December, 1840, to instruct 'the supreme judicial power,' how the law shall be 'taken and held' to have been in 1826 or in May, 1840, is an infringement of the distribution of powers made by our form of government, and a breach of the fundamental principle set forth in the 'Bill of Rights,' Sec. 4. 'The legislative, executive and supreme judicial power ought to be forever separate and distinct from each other.'" Houston vs. Bogle, 32 N. C. (10 Iredell Law), 496, 503 and 504.

Herndon vs. Insurance Co., 111 N. C., 384, 387; 16 S. E., 465 (September Term, 1892), was an instance where a motion for a rehearing was made by defendant's counsel, in which he contended that Supreme Court Rule No. 53, which required the endorsement of the petition by one member of the court before a rehearing could be granted, was contrary to law, as there was a statute relating to this matter.

Said Justice Clark, speaking for the court (Chief Justice A. S. Merrimon and Associates J. E. Shepherd, A. C. Avery, Walter Clark and James C. MacRae):

"This brief review of the development of popular government in North Carolina is not inappropriate. The members of this court receive, like the legislative and executive, their mandate from the people. The same organic law which gives the Legislature power to make rules and regulations for the orderly and regular dispatch of business in its sessions, free from the control or interference of the executive or of this court, gives the same power over to its precedure to this court, free from interference from either of the other co-ordinate branches of government. Neither body has shown any disposition to encroach upon the constitutional pre-

rogatives of this court. But as the right to do has been raised by the argument in this case, it is due to the dignity of the court to pass upon the claim to legislative interference put forward by counsel." Herndon vs. Ins. Co., 111 N. C., 384, 387; 16 S. E., 465.

Miller vs. Alexander, 122 N. C., 718, 720 and 721; 30 S. E., 125 (February Term, 1898), presents the question whether the Legislature can by special act direct the sale of property held by several parties, which the court held was purely a judicial function and that the act was unconstitutional.

Said Chief Justice Faircloth, speaking for the court (Chief Justice W. T. Faircloth and Associates Walter Clark, D. M. Furches, Walter A. Montgomery and R. M. Douglas):

"The real question presented in the case is this: Is the Act unconstitutional? Article 1, Section 8, is in these words: 'The legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other.' In petitions for a judicial sale of lands the court hears the allegations and requires proof, and passes upon the sufficiency of the proof and determines upon such proof and the surrounding circumstances the propriety of ordering the sale. This is manifestly a judicial duty. The Legislature in the case before us assumed to pass upon and determine these questions on an ex parte application, and authorized a sale upon a state of facts which this court had held could not be done because of the contingency as to who would be the owners when the life estate determined. In this way the Legislature undertook to exercise judicial power, and in doing so crossed the line between the legislative and judicial branches, marked out by the Constitution. In Robinson vs. Barfield, 6 N. C., 391 (392), a deed was acknowledged by a *feme covert* and ordered to be registered, there being no private examination. An Act of Assembly

subsequently passed declared that such deeds not executed according to law 'shall be held, deemed and taken to be firm and effectual in law.' The court held that the Act was *unconstitutional* and in violation of Article 1, Section 8. Hoke vs. Henderson, 15 N. C., 1."

Miller vs. Alexander, 122 N. C., 718, 720 and 721; 30 S. E., 125.

Henderson vs. Traction Co., 132 N. C., 779, 786 and 787, 44 S. E., 598 (February Term, 1903), is a personal injury suit, in which the defendant claimed it was exempt from equipping its cars with fenders, with the proviso that the Corporation Commission might make exemption when in their judgment the enforcement of the law was unnecessary. The Commission had a hearing and exempted all electric lines until further order of the Commission. The court very strongly says the Commission has no power to suspend a law as this amounts to in this instance.

Said Justice Connor, speaking for the court (Chief Justice Walter Clark, and Associates W. A. Montgomery, R. M. Douglas, P. D. Walker and H. G. Connor):

"In the view which we take of the case, it does not become necessary to pass upon the constitutionality of that portion of the Act which confers upon the Corporation Commission the power to make exemptions from its provisions. The question was not presented or referred to in the argument. The right of the Legislature to confer upon any other governmental agency the power to exempt any persons or corporations from the operation of a statute, the violation of which is made a misdemeanor, is, to say the least, exceedingly doubtful. There is a marked difference between the power to make statutes of local application dependent upon a vote of the people and the power sought to be given the Corporation Commission in this instance. The statute here is complete, the duty is imposed, and the penalty for its violation fixed. A strict observance of the divi-

sion of powers between the three co-ordinate departments of the government is absolutely essential to the preservation and the harmonious working of our system of government. The Constitution confers upon the Legislature alone all legislative authority, and declares that the power of suspending the laws without the consent of the people ought not to be exercised. An interesting discussion of this question may be found in State vs. Fields, 17 Mo., 529; 59 Am. Dec., 275, and Slinger vs. Henneman, 38 Wis., 505. The extent of the power which may be conferred upon the Corporation Commission is set forth and discussed by Shepherd, C. J., in Express Co. vs. Railroad Co., 111 N. C., 463; 18 L. R. A., 393; 32 Am. St. Rep., 805.

"Conceding for the purpose of this opinion only that the portion of the Act in question is constitutional, we think by a proper construction of it the extent of the power conferred upon the Commission is one of *exemption* and not one of *suspension*. The order made by the Commission exempts all street railway companies from the provisions of the Act, as to the fenders, until otherwise ordered by the Commission, thus applying it to all street railways in the State, and of course operating, if within the power of the Corporation Commission to suspend the statute. This, we think, exceeds the power conferred by the statute and is therefore invalid, thus leaving the Act in force and the duty of the street railway companies to provide fenders as prescribed by the Act." Henderson vs. Traction Co., 132 N. C., 779, 786 and 787; 44 S. E., 598.

Another case in which the subject is touched upon, though not treated to any extent, is the opinion of Judge Reade in the legislative term of office case (64 N. C., 785, 792), where the Legislature asked the Supreme Court to advise them as to the construction of a law. Chief Justice Pearson and Judge Dick gave their opinions, but Judges Reade, Rodman and Settle declined to do so, the latter three writing separate opinions, of which Judge Reade's is the strongest.

Said Judge Reade:

"It may be that the Legislature had the power to make it the duty of the judges to give their opinions when asked for; and although the Act which organized the court did not impose such duty, yet, if it might have been done by that Act, then it might have been done by any subsequent Act. And treating a *request* that they *would*, as a *command* that they *should*, the giving of opinions became, not a courtesy, but a duty. That was certainly so, unless it was forbidden by the general provision, which is both in the old and new Constitution, that the 'legislative, executive and judicial departments of the government shall be forever separate and distinct.' And I am now of the opinion that that provision did forbid the old or new judges to give their opinions now as asked for.

"The obvious meaning of that clause is, that neither of these departments shall exercise the functions, nor influence or control the other. Under this constitutional prohibition, I do not think it a mere question of propriety, and that I may or may not answer at pleasure. I think it is substantially an interference with the legitimate business of the Legislature, and that the Constitution forbids it. * * * Nor is the objection met by saying that we do not meddle with the Legislature officially, but only courteously, and at their request. The Legislature has no more right to ask than we have to answer. We must let each other alone. 'Forever separate and distinct.'

"If the Legislature asks our advice with the view to regulate its action accordingly, are they not delegating those functions to us, and are we not substantially exercising the powers of legislation? And is not that the evil intended to be guarded against by the Constitution? Legislators are responsible to their constituents. They can not shift that responsibility. I appreciate their anxiety to act upon the fullest information. But I think the Justices are forbidden to interfere."

Another North Carolina case from Federal authority is that of Ogden vs. Witherspoon, 3 N. C. (2 Hay), 227 (page 404 in Battle's Reprint), which was decided in the Circuit Court (Chief Justice Marshall and District Judge Potter, sitting at Raleigh, North Carolina), in December, 1802, the facts of which are almost identical with the case of Houston vs. Bogle, 32 N. C., cited above as to the separation of the three departments of government. The Legislature, in aid of the Confiscation Acts, had passed an Act construing the law and attempting to make it retroactive in its effect, which attempted exercise of judicial power Chief Justice Marshall thus disposes of:

> "The Bill of Rights of this State, which is declared to be a part of the Constitution, says in the fourth section, 'That the legislative, executive and supreme judicial power ought to be forever separate and distinct from each other.' The separation of these powers has been deemed by the people of almost all the States as essential to liberty. And the question here is, does it belong to the judiciary to decide upon laws when made, and the extent and operation of them; or to the Legislature? If it belongs to the judiciary, then the matter decided by this Act, namely, whether the Act of 1789 be a repeal of the 9th section of 1715, is a judicial matter and not a legislative one. The determination is made by a branch of the government, not authorized by the Constitution to make it; and is, therefore, in my judgment void." His case is reported in 18 Fed. Case 10, 461.

We are indebted to Mr. A. B. Andrews, Jr., of the Raleigh bar for the forgoing cases from the State of North Carolina, including an opinion of Chief Justice Marshall, himself, construing the Constitution of North Carolina. They are conclusive as to the question that legislation attempting to confer executive, judicial and legislative functions upon the same body is absolutely void.

These decisions are in accord with the general law on this subject.

In Kilbourn vs. Thompson, 103 U. S., 168, this court has said:

> "In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments can not be exercised by another.
>
> "It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them.
>
> "The House of Representatives having the exclusive right to originate bills of revenue, whether by taxation or otherwise; having with the Senate the right to declare war, and to fix the compensation of all officers and servants of the government, and vote the supplies which must pay that compensation; and being also the most numerous body of all those engaged in the exercise of the primary powers of the government—is for these reasons least of all liable to suffer encroachments upon its appropriate domain.

"By reason, also, of its popular origin, and the frequency with which the short term of office of its members requires the renewal of their authority at the hands of the people, the great source of all power in this country, encroachments by that body on the domain of coordinate branches of the government would be received with less distrust than a similar exercise of unwarranted power by any other department of the government. It is all the more necessary, therefore, that the exercise of power by this body, when acting separate from and independent of all other depositories of power, should be watched with vigilance, and, when called in question before any other tribunal having the right to pass upon it, that it should receive the most careful scrutiny.

"In looking to the Preamble and Resolution under which the committee acted, before which Mr. Kilbourn refused to testify, we are of the opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because the power was in its nature clearly judicial."

Kilburn vs. Thompson, 103 U. S., 168, 191-192; 26 L. Ed., 377, 387.

A notable case reviewing all the authorities is that of Myatt vs. Western Union Tel. Co., 98 F. R., 347.

See also case of Kansas vs. Johnston, 61 Kans., 803, where the "court of visitation," established by an Act of the Legislature of Kansas, was declared to be unconstitutional because it attempted to combine in one body legislative, judicial and executive functions. This Kansas case is a very strong authority on the subject, and both the Myatt case and the Kansas case were cited by the Attorney-General of the United States in his opinion of May 6, 1905, addressed to the Hon. Stephen B. Elkins, Chairman of Committee on Interstate Commerce. It would be a work of supereroga-

tion to attempt to add anything to the reasoning of these cases and we will not attempt to do so. It is clearly established by the case of Myatt vs. Western Union Tel. Co., 98 F. R., 347, that the Fourteenth Amendment to the Constitution of the United States insures to every citizen protection against confiscation of his property by the acts of a tribunal which is not in reality a court and that it violates the Federal Constitution to clothe any single body of men with power to act as legislators, judges and executioners in reference to the same matter.

We can add nothing to the reasoning of this case on this point. It likewise contains an exhaustive review of authorities.

It is clear that the Act creating the North Carolina Corporation Commission is absolutely invalid, because the various powers conferred upon that body are so blended and interwoven one with the other that it is impossible to segregate any particular portion of the Act and declare that void, leaving the balance thereof remaining. This was the conclusion of the Kansas Supreme Court in reference to the statute creating the Court of Visitation, which is quite similar to the statute creating the North Carolina Corporation Commission. In discussing this feature the Supreme Court of Kansas said:

> "Where the same Act which creates a tribunal also attempts to vest it with these separate and independent powers (and it is evident that the Legislature would not have created such a tribunal for the exercise of one class of such powers only) the whole Act must fall because of the invalidity of the inseparable part."
> 61 Kan., 803.

This is precisely the situation in the case at bar, for it is clear beyond question that the legislative intent was not to create a body to exercise alone either the judicial, the execu-

tive or the legislative functions conferred upon North Carolina Corporation Commission, but the object of the entire legislation was to create a body that could exercise all of the functions conferred upon it, consequently it is absolutely impossible to separate one portion of the Act from the other and declare that void, but the entire Act must fall.

Trade-mark Cases, 100 U. S., 82.
U. S. vs. Reese, 92 U. S., 214.
Connolly vs. Pipe Co., 184 U. S., 540, 565.

It necessarily follows that an order of any such unconstitutional body is void for it has been settled beyond question that an unconstitutional law can not create even a *de facto* officer and that no office at all exists under an unconstitutional statute.

See Norton vs. Shelby County, 118 U. S., 425; 30 L. Ed., 178.

Respectfully submitted,
FABIUS H. BUSBEE,
CLAUDIAN B. NORTHROP,
Solictors for Southern Railway Company.

NORTH CAROLINA CORPORATION COMMISSION LAW.

Being Chapter 20, Revisal of 1905, including Amendments of the Legislature of 1905. Also miscellaneous Acts in relation to the Corporation Commission.

CORPORATION COMMISSION.

		Sections.
I.	Court,	1054—1063
II.	Investigations,	1064—1065
III.	Powers,	1066—1073
IV.	Appeals,	1074—1081
V.	Injunction,	1082—1085
VI.	Penalties,	1086—1093
VII.	Jurisdiction,	1094—1103
VIII.	Rates,	1104—1112
IX.	Duties,	1113—1118
X.	Tax commissioners,	1119—1127

I. COURT.

1054. COURT OF RECORD. There shall be a court of record, known as the "corporation commission." Such court shall adopt a seal, and shall have all of the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in this chapter. The members and clerk thereof may administer oaths. 1899, c. 164, ss. 1, 31.

1055. NUMBER OF COMMISSIONERS. The court shall consist of three commissioners, who shall be elected by the qualified voters of the state, in the same manner as other

state officers are elected. The court shall organize by the election of one of the comissioners as chairman. 1899, c. 164, s. 1.

1056. TERM OF OFFICE. The term of office of the commissioners shall begin on the first day of January next after their election, and shall continue for six years and until their successors are elected and qualified. One member of the court shall be elected at each general election. 1899, c. 164.

1057. VACANCY. If for any cause there shall be a vacancy in the commission, the governor shall appoint to such vacancy. Such appointee shall hold until the election and qualification of his successor, who shall be elected at the next general election, after the vacancy occurred. The person so elected shall hold office for the unexpired term. 1899, c. 164; 1901, c. 194.

1058. QUALIFICATION OF COMMISSIONERS. It shall be unlawful for any member or official of said court to jointly, severally, or in any other way, either directly or indirectly hold any stock or bond, or be the agent, attorney or employee, or have any interest in any way in any steamboat, railroad, canal, navigation, express, telegraph, telephone, bank or building and loan company, or association. If any member or official of said court shall, during the term of his office as distributee or legatee, or in any other way, have or become entitled to any stock or bonds or interest therein of any such company he shall at once dispose of the same, and upon failure to do so shall forfeit his office, and may be suspended by the governor. 1899, c. 164.

1059. OATH OF OFFICE. The members of the court, in addition to the oath to support the constitution and laws of the United States and the constitution and laws of the state of North Carolina, shall take, to be administered by one of the judges of the supreme court, the following oath of office, which oath shall be signed by such commissioners and attested by said judge and recorded in the office of the secretary of state: "I do solemnly swear (or affirm) that I am not the owner of any steamboat or of any stock or bond of any railroad, navigation or canal company, express, telegraph or telephone company, or of any bank or build-

ing and loan association, or the agent or attorney or employee of any such company or association; that I have no interest in any way in any such company or association, and that I will well and faithfully execute the duties of my office as a member of the corporation commission and as state tax commissioner to the best of my knowledge and ability, without fear, favor, malice, reward or the hope of reward. So help me, God." 1899, c. 164, s. 1; 1903, c. 251, s. 3.

1060. PLACE OF MEETING. The court shall be held in the city of Raleigh. Special sessions may be held at any place, in the state, when in the judgment of the court the convenience of all parties is best subserved and expense is thereby saved. 1899, c. 164, ss. 30, 31; 1901, c. 679, s. 4.

1061. OPEN AT ALL TIMES. The court shall be open at all times for the transaction of business, and each member shall devote his whole time to the discharge of the duties of his office, and it shall be his duty to remain in the office of the commission at least fifteen days in each month, unless detained therefrom on official business. 1899, c. 164, s. 30; 1903, c. 251, s. 3.

1062. QUORUM. Any two members of the court shall constitute a quorum for the transaction of business. The chairman is hereby authorized and empowered to perform the duties and exercise the powers conferred by law upon the corporation commission as to or over banks and building and loan associations, but this shall not prevent, as to banking and building and loan associations, the other members of the court from acting with the chairman in all of such matters. 1899, c. 164, s. 29.

1063. CLERK. The court shall appoint a clerk, who shall be an expert accountant, experienced in railroad statistics and transportation rates. His term of office shall be for two years. He shall take and subscribe to oaths of office similar to those prescribed for the commissioners. 1899, c. 164, ss. 9, 31.

II. INVESTIGATIONS.

1064. EXAMINATIONS. The commissioners shall from time to time visit the places of business, and investigate

the books and papers of all corporations, firms or individuals engaged in the transportation of freight or passengers, the transmission of messages either by telegraph or telephone, all public or private banks, loan and trust companies, and all building and loan associations, to ascertain if all the orders, rules and regulations of the corporation commission have been complied with, and shall have full power and authority to examine all officers, agents and employees of such companies, individuals, firms, or corporations, and all other persons, under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this chapter and the chapter entitled "Banks" and "Building and Loan Associations." 1899, c. 164, s. 1.

1065. RAILROAD ACCIDENTS. The commission may investigate the causes of any accident on a railroad or steamboat which it may deem to require investigation, and any evidence taken upon such investigation shall be reduced to writing, filed in the office of the commission, and be subject to public inspection. 1899, c. 164, s. 24.

III. POWERS.

1066. GENERAL POWERS. The corporation commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies. 1899, c. 164; 1901, c. 679.

1067. WITNESSES; PRODUCTION OF PAPERS; CONTEMPT. The corporation commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts. 1899, c. 164, ss. 1, 9, 10.

1068. RULES OF PRACTICE. The corporation commis-on shall prescribe rules of practice and procedure in all atters before it and in all examinations necessary to be ade under this chapter. 1899, c. 164, s. 2, subsec. 24.

1069. RULES OF EVIDENCE. In all cases under the pro-sions of this chapter the rules of evidence shall be the same in civil actions, except as provided by this chapter. 1899, 164, s. 26.

1070. SUBPOENAS, HOW ISSUED; SERVED. All subpœnas r witnesses to appear before the commission or before any e or more of the commissioners, and notice to persons corporations, shall be issued by one of the commissioners its clerk and be directed to any sheriff, constable or to e marshal of any city or town, who shall execute the same d make due return thereof as directed therein under the nalities prescribed by law for a failure to execute and turn the process of any court. 1899, c. 164, s 10.

1071. SERVICE OF ORDERS. The clerk of the commis-n may serve any notice issued by it and his return thereof ll be evidence of said service; and it shall be the duty the sheriffs and other officers to serve any process, sub-nas and notices issued by the commissioners, and they ll be entitled therefor to the same fees as are prescribed law for serving similar papers issuing from the superior rt. 1899, c. 164, s. 9.

1072. UNDERTAKINGS. All bonds or undertakings re-red to be given by any of the provisions of this chapter ll be payable to the state of North Carolina, and may sued on as are other undertakings which are payable to state. 1899, c. 164, s. 7.

1073. CONTROVERSIES MAY BE SUBMITTED TO COMMIS-N. Whenever any company or corporation embraced in s chapter has a controversy with another corporation or son and all the parties to such controversy agree in ting to submit such controversy to the commission as itrators, the commission shall act as such, and after due ice to all parties interested shall proceed to hear the e, and their award shall be final. Such award in cases ere land or an interest in land is concerned shall im-diately be certified to the clerk of the superior court of county in which said land is situated and shall by such

clerk be docketed in the judgment docket for such county, and from such docketing shall be a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrators. 1899, c. 164, s. 25.

IV. APPEALS.

1074. RIGHT OF; HOW TAKEN. From all decisions or determinations made by the corporation commission any party affected thereby shall be entitled to an appeal. Before such party shall be allowed to appeal, he shall, within ten days after notice of such decision or determination, file with the commission exceptions to the decision or determination of the commission, which exceptions shall state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled, then such party may appeal from the order overruling the exception, and shall within ten days after the decision overruling the exception, give notice of his appeal. When an exception is made to the facts as found by the commission, the appeal shall be to the superior court in term time; otherwise to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the commission exceptions to the decision or determination overruling the exception, which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the commission shall, within ten days, transmit all the papers and evidence considered by it, together with the assignment of errors filed by the appellant, to a judge of the superior court holding court or residing in some district in which such company operates or the party resides. If there be no exceptions to any facts as found by the commission, it shall be heard by the judge at chambers at some place in the district of which all parties shall have ten days' notice. 1899, c. 164, ss. 7, 28; 1903, c. 126.

1075. APPEAL DOCKETED; PRIORITY OF TRIAL; BURDEN. The cause shall be entitled "*State of North Carolina on relation of the Corporation Commission against* (here insert name of appellant)," and if there are exceptions to any facts found by the commission, it shall be placed on the

civil issue docket of such court and shall have precedence of other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of other civil causes, except that the rates fixed or the decision or determination made by the commission shall be *prima facie* just and reasonable. 1899, c. 164, s. 7. Note. See s. 1112.

1076. HEARD AT CHAMBERS BY CONSENT. By consent of all parties the appeal may be heard and determined at chambers before any judge of a district through or into which the railroad may extend, or any judge holding court therein, or in which the person or company does business. 1899, c. 164, s. 7.

1077. TO SUPREME COURT. Either party may appeal to the supreme court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that the state of North Carolina if it shall appeal shall not be required to give any undertaking or make any deposit to secure the cost of such appeal, and such court may advance the cause on its docket so as to give the same a speedy hearing. 1889, c. 164, s. 7.

1078. RATES VACATED PENDING APPEAL; HOW. The rates of freight and fare fixed by the commission shall be and remain the established rates and shall be so observed and regarded by corporations appealing until the same shall be changed, reversed or modified by the judgment of the superior court, unless the railroad company shall within fifteen days file with said commission a justified undertaking, in a sum to be fixed by the commission, conditioned to pay the state of North Carolina the difference between the aggregate freights charged or received and those fixed by said commission, and to make a report of freights charged or received every three months during the pendency of such appeal; and whenever such difference in freights equals or exceeds the penalty of such undertaking the commission may require another to be executed and filed with them. From the time the undertaking first mentioned is filed the judgment appealed from shall be vacated; but failure for ten days to file any additional undertaking required by the commission shall *co instanti* revive such judgment. Out of the funds paid into the state treasury under this section there shall be re-

funded to shippers the overpaid freight ascertained by the final determination of the appeal on the recommendation of the commission, if application therefor is made within one year from such final determination. 1889, c. 164, s. 7.

1079. JUDGMENT SUPERIOR COURT NOT VACATED BY APPEAL. Any freight or passenger rates fixed by the commission, when approved or confirmed by the judgment of the superior court, shall be and remain the established rate and shall be so observed and regarded by an appealing corporation until the same shall be changed, revised or modified by the final judgment of the supreme court, if there shall be an appeal thereto, and until changed by the corporation commission. 1899, c. 164, s. 7.

1080. JUDGMENT ON APPEAL ENFORCED BY MANDAMUS. In all cases in which, upon appeal, a judgment of the corporation commission is affirmed, in whole or in part, the appellate court shall embrace in its decree a mandamus to the appellant to put said order in force, or so much thereof as shall be affirmed. 1905, c. 107, s. 2.

1081. PEREMPTORY MANDAMUS TO ENFORCE ORDER, WHEN NO APPEAL. If no appeal is taken from an order or judgment of the corporation commission within the time prescribed by law, but the corporation affected thereby fails to put said order in operation, the corporation commission may apply to the judge riding the superior court district which embraces Wake county, or to the resident judge of said district at chambers, upon ten days' notice for a peremptory mandamus upon said corporation for the putting in force of said judgment or order; and if said judge shall find that the order of said commission was valid and within the scope of its powers, he shall issue such peremptory mandamus. An appeal shall lie to the supreme court in behalf of the corporation commission, or the defendant corporation, from the refusal or the granting of such peremptory mandamus. 1905, c. 107.

V. INJUNCTION.

1082. WHEN GRANTED; BOND. No judge shall grant an injunction, restraining order or other process staying or affecting, during the pending of any appeal, the enforcement of any determination of the corporation commission

fixing rates or fares, without requiring as a condition precedent the executing and filing with the corporation commission of a justified undertaking in the sum of not less than twenty-five thousand dollars for any company whose road is of less length than fifty miles, and fifty thousand dollars for any company whose road is over fifty miles in length, conditioned that the company will make and file with the corporation commission a sworn statement every three months during the pending of the appeal of the items of freight, with names of shippers, carried over such company's road within the preceding ninety days, showing the freights charged and those fixed by the corporation commission; and in the event the determination of the corporation commission appealed from is affirmed in part or in whole such company shall within thirty days pay into the treasury of North Carolina the aggregate difference between the freights collected and those fixed by the final determination of the matter appealed. 1899, c. 164, s. 7.

1083. RESTRAINING ORDER VACATED, WHEN. Whenever the aggregate difference between the freights collected and those fixed by the corporation commission shall equal or exceed the sum specified in the undertaking, the corporation commission shall notify the appellant that another justified undertaking in like sum and with the same conditions as the original undertaking is required to be executed and filed with the corporation commission. A failure to file with the corporation commission the sworn statement provided for in the preceding section, or any one of them when more than one is required or asked for, or a failure to give an additional undertaking when required within fifteen days from notice so to do, shall vacate and render null and void any restraining order, injunction or other process to stay the enforcement of any determination of the corporation commission as to schedules of rates. 1899, c. 164, s. 7.

1084. SUITS ON INJUNCTION BOND. When any of the conditions of such undertaking are broken it may be sued on and enforced in the name of the state of North Carolina on the relation of the corporation commission by summons returnable to the superior court of any county in the state at a regular term thereof. The solicitor of the district shall

prosecute the action in his court on behalf of the state, and shall be allowed such fees, to be taxed in the bill of costs, as the court may order; and the attorney general shall prosecute on appeal to the supreme court on behalf of the state and shall be allowed such fees, to be taxed in the bill of costs, as the court shall allow. 1899, c. 164, s. 7.

1085. WHAT RECOVERED; APPLICATION OF RECOVERY. In cases where the sworn statements herein required to be made are not made the whole penalty of the undertaking shall be enforced and paid into the state treasury. The sums paid into the treasury under the provisions of this section shall be used to reimburse the shippers of freights for the excess of freights paid over what should have been paid, such reimbursements to be made on recommendation of the corporation commission: Provided, application therefor is made within one year after the determination of the appeal in which the undertaking was given. The recovery in each undertaking shall be applied to such excess of freights as has been paid during the period covered by such undertaking. 1899, c. 164, s. 7.

VI. PENALTIES.

1086. FOR VIOLATING RULES. If any railroad company doing business in this state by its agents or employees shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officers thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer if residing in the state, or if not then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation as may be directed by the commission shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars. 1899, c. 164, s. 15.

1087. REFUSING TO OBEY ORDERS OF COMMISSION. Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the corporation commission shall, in addition to the other penalties prescribed in

this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior court of Wake county, in the name of the state of North Carolina on the relation of the corporation commission; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the corporation commission shall be a separate offense. 1899, c. 164, s. 23.

1088. DISCRIMINATION BETWEEN CONNECTING LINES. All common carriers subject to the provisions of this chapter shall according to their powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freights to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges against such connecting lines, and connecting lines shall be required to make as close connection as practicable for the convenience of the traveling public. And common carriers shall obey all rules and regulations made by the commission relating to trackage. 1899, c. 164, s. 21.

1089. FAILURE TO MAKE REPORTS. Every officer, agent or employee of any railroad company, express or telegraph company who shall wilfully neglect or refuse to make and furnish any report required by the commission for the purposes of this chapter, or who shall wilfully or unlawfully hinder, delay or obstruct the commission in the discharge of the duties hereby imposed upon it, shall forfeit and pay five hundred dollars for each offense, to be recovered in an action in the name of the state. A delay of ten days to make and furnish such report shall raise the presumption that the same was wilful. 1899, c. 164, s. 18.

1090. GENERAL OFFENSES. If any railroad company shall violate the provisions of this chapter not otherwise provided for, such railroad company shall incur a penalty of one hundred dollars for each violation, to be recovered by the party injured. 1899, c. 164, s. 17.

1091. VIOLATION OF RULES, CAUSING INJURY; DAMAGES; LIMITATION. If any railroad company doing business in

this state shall, in violation of any rule or regulation provided by the commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of wilful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury. 1899, c. 164, s. 16.

1092. ACTION FOR, WHEN AND HOW BROUGHT. An action for the recovery of any penalty under this chapter shall be instituted in the county in which the penalty has been incurred, and shall be instituted in the name of the state of North Carolina on the relation of the corporation commission against the company incurring such penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the state of North Carolina on the relation of the corporation commission upon the complaint of such injured person or corporation against the company incurring such penalty. Such action shall be instituted and prosecuted by the attorney general or the solicitor of the judicial district in which such penalty has been incurred, and the judge before whom the same is tried shall determine the amount of compensation to be allowed the attorney general or such solicitor prosecuting said action for his services, and such compensation so determined shall be taxed as part of the cost. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions. 1899, c. 164, s. 15.

1093. REMEDIES CUMULATIVE. The remedies given by this chapter to persons injured shall be regarded as cumulative to the remedies now given or which may be given by law against railroad corporations, and this chapter shall not be construed as repealing any statute giving such remedies. 1899, c. 164, s. 26.

VII. JURISDICTION.

1094. DELIVERING FREIGHT, EXPRESS AND BAGGAGE. The corporation commission shall make reasonable and just rules—

1. For the handling of freight and baggage at stations.

2. As to charges by any company or corporation engaged in the carriage of freight or express for the necessary handling and delivery of the same at all stations. 1899, c. 164, s. 2, subsecs. 2, 7.

1095. PREVENT DISCRIMINATIONS. The corporation commission shall make reasonable and just rules and regulations—

1. To prevent discrimination in the transportation of freight or passengers.

2. To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or the misleading or deceiving the public in any manner as to real rates charged for freight, express or passengers. 1899, c. 164, s. 2, subsecs. 3, 5.

1096. TELEGRAPH AND TELEPHONE RATES. The commission shall have power and are directed to make just and reasonable rates of charges for the transmission of messages by any telegraph or telephone company or corporation doing business in this state, and for the rental of telephones. 1899, c. 164, s. 2, subsecs. 10, 11.

1097. STATIONS AND DEPOTS. The commission is empowered and directed—

1. To require, where the public necessity demands and it is demonstrated that the revenue received will be sufficient to justify it, the establishment of stations by any company or corporation engaged in the transportation of freight and passengers in this state, and to require the erection of depot accommodations commensurate with such business and revenue: Provided, the commissioners shall not require any company or corporation to establish any station nearer to another station than five miles. 1899, c. 164, s. 2, subsec. 12.

2. To require a change of any station or the repairing, addition to, or change of any station house by any railroad or other transportation company in order to promote the security, convenience and accom-

modation of the public and to require the raising or lowering of the track at any crossing when deemed necessary. 1899, c. 164, s. 2, subsec. 13.

3. To require when practicable, and when the necessities of the case, in the judgment of the corporation commission, require, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, accommodation and convenience of traveling public, and to unite in the joint undertaking and expense of erecting, constructing and maintaining such union passenger depot, commensurate with the business and revenues of such railroad companies or corporation, on such terms, regulations, provisions and conditions as the commission shall prescribe. The railroads so ordered to construct a union depot shall have power to condemn land for such purpose, as in case of locating and constructing a line of railroad: Provided, that nothing in this section shall be construed to authorize the commission to require the construction of such union depot should the railroad companies at the time of application for said order have separate depots, which, in the opinion of the corporation commission, are adequate and convenient and offer suitable accommodations for the traveling public. 1903, c. 126.

4. To require the establishment of separate waiting rooms at all stations for the white and colored races. 1899, c. 164, s. 2, subsec. 14.

5. To require the construction of side tracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such side track is sufficient within five years to pay the expenses of its construction. This shall not be construed to give the commission authority to require railroad companies to construct side tracks more than five hundred feet in length. 1899, c. 164, s. 2, subsec. 15.

1098. DEPOTS NOT ABANDONED. A railroad corporation which has established and maintained for a year a passenger station or freight depot at a point upon its road shall not abandon such station or depot, nor substantially diminish the accommodation furnished by the stopping of trains ex-

cept by consent of the commission. Freight or passenger depots may be relocated upon the written approval of the commission. 1899, c. 164, ss. 19, 20.

1099. FREIGHT AND PASSENGER RATES. The commission shall make reasonable and just rates—

1. Of freight, passenger and express tariffs for railroads, street railways, steamboats, canal and express companies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

2. For the through transportation of freight, express or passengers.

3. Of charges for the transportation of packages by any express company or corporation.

4. Of charges for the use of railroad cars carrying freight or passengers.

5. And rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

6. And shall make, require or approve what is known as "milling-in-transit" rates on grain; or lumber to be dressed and shipped over the line of the railroad company on which such freight originated.

7. And conjointly with such railroad companies shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the state.

Nothing in this chapter shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the commission. 1899, c. 164, ss. 2, 14; 1903, c. 683.

1100. DEMURRAGE; STORAGE; PLACING AND LOADING OF CARS. The commission shall make rules, regulations and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time

limit for delivery of freights after the same have been received by the transportation companies for shipment. 1903, c. 342.

1101. MAY FIX RATE OF SPEED TRAINS MAY RUN THROUGH A TOWN; PETITION TO BE FILED; PROCEDURE. If any railroad company shall be of the opinion that an ordinance of a city or town through which a line of its railroad passes, except in the counties of Cumberland, Rockingham, Union and Wayne, regulating the speed at which trains may run while passing through said city or town, is unreasonable or oppressive, such railroad company may file its petition before the corporation commission setting forth all the facts, and asking relief against such ordinance, and that the corporation commission prescribe the rate of speed at which trains may run through said municipality. Upon the filing of the petition a copy thereof shall be mailed, in a registered letter, to the mayor or chief officer of the town or municipality, together with a notice from the corporation commission setting forth that on a day named in the notice the petition of the railroad company will be heard, and that the city or town named in the petition will be heard at that time in opposition to the prayer of the petition. And upon the return day of the notice the corporation commission shall hear the petition: Provided, that any hearing granted by the corporation commission, as authorized by this section, shall be had at the town, city or locality where the conditions complained of are alleged to exist, or some member of the said commission shall take evidence both for the petition and against it, at such city, town or locality, and report to the full commission before any decision is made by the commission. 1903, c. 552.

1102. TO PASS ON ORDINANCE, AND FIX RATE OF SPEED. Either party, petitioner or respondent shall have the right to introduce testimony and to be heard by counsel, and the corporation commission after hearing the petition, answer, evidence and argument, shall render judgment thereon. If the commission shall find that such ordinance is reasonable and just the petition shall be dismissed, and the petitioner shall pay all the costs, to be taxed by the clerk to the corporation commission. If the corporation commission shall be of the opinion that the ordinance is un-

reasonable, it shall so adjudge; and in addition thereto t shall prescribe the maximum rates of speed for passng through such town. And thereafter the railroad company may run its trains through such town or city at speeds not greater than those prescribed by the corporation commission, and the ordinance adjudged to be unreasonable shall not be enforced against such railroad company. 1903, . 552, s. 2.

1103. WHEN COSTS ON HEARING TO FIX RATE OF SPEED N DISCRETION OF COMMISSION. If the judgment of the orporation commission shall be in favor of the petitioner, t shall be lawful for the corporation commission to make uch order as to the payment of the costs as shall seem ust. It may require either party to pay the same or it may ivide the same. The costs in such proceeding shall be the ame as are fixed by law for similar services in the superior ourt. 1903, c. 552, s. 3.

VIII. RATES.

1104. HOW FIXED. In fixing any maximum rate or harge, or tariff of rates or charges for any common carier, person or corporation subject to the provisions of this hapter the commission shall take into consideration, if roved, or may require proof of, the value of the property f such carrier, person or corporation used for the public the consideration of such rate or charge or the fair value f the service rendered in determining the value of the propty so being used for the convenience of the public. It hall furthermore consider the original cost of the conruction thereof and the amount expended in permanent nprovements thereon and the present compared with the riginal cost of construction of all its property within the ate; the probable earning capacity of such property under e particular rates proposed and the sum required to meet e operating expenses of such carrier, person or corporaon and all other facts that will enable them to determine hat are reasonable and just rates, charges and tariffs. 99, c. 164, s. 2, subsec. 1.

1105. WHAT MAY BE CARRIED FREE. Nothing in this hapter shall prevent the carriage, storage or handling of operty free or at reduced rates for the United States, states

or municipal governments or for charitable or educational purposes; or for any corporation or association incorporated for the preservation and adornment of any historic spot, or to the employees or officers of such company or association while traveling in the performance of their duties, provided they shall not travel further than ten miles one way on any one trip free of charge, or to or from fairs or exhibitions for exhibition thereat; or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the free transportation of persons traveling in the interest of orphan asylums or homes for the aged and infirm, or any department thereof, or ex-Confederate soldiers attending annual reunions, or the issuance of mileage, excursion or commutation passenger tickets; or to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge under arrangements with the boards of managers of said homes; or to prevent railroads from giving free carriage to their own officers and employees and members of their families, or to prevent the principal officers of any railroad company from exchanging passes or tickets with other railroad companies for their officers or employees. Nothing in this section shall be construed to prevent or restrict transportation companies from contracting with newspapers for advertising space in exchange for transportation over their lines to such an extent as may be agreed upon between the two parties for said consideration. The commissioners and their clerks shall be transported free of charge over all railroads and other transportation lines which are under the supervision of the commission; and when traveling on official business they may take with them experts or other agents whose service they may deem temporarily of public importance. 1899, c. 164, s. 22; 1899, c. 642; 1901, c. 679, s. 2; 1901, c. 652; 1905, c. 312.

1106. REVISION OF RATES. The commission shall from time to time, and as often as circumstances may require,

change and revise or cause to be changed and revised any schedules of rates fixed by the commission, or allowed to be charged by any carrier of freight, passengers, or express, or by any telegraph or telephone company. 1899, c. 164, s. 7.

1107. LONG AND SHORT HAULS. It shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the commission, such common carrier may in special cases be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, that nothing in this chapter contained shall be taken as in any manner abridging or controlling the rates of freight charged by any railroad in this state for conveying freight which comes from or goes beyond the boundaries of the state and on which freight less than local rates on any railroad carrying the same are charged by such railroads. 1899, c. 164, s. 14.

1108. CONTRACTS AS TO RATES. All contracts and agreements between railroad companies as to rates of freight and passenger tariffs shall be submitted to the commission for inspection and correction, that it may be seen whether or not they are a violation of law or of the rules and regulations of said commission, and all arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies shall be submitted to the commission for inspection and approval in so far as they affect the rules and regulations made by the commission to secure to all persons doing business with such companies just and reasonable rates of freight and passenger tariffs, and the commission may make such rules and regulations

as to such contracts and agreements as may then be deemed necessary and proper, and any such agreements not approved by the commission, or by virtue of which rates shall be charged exceeding the rates fixed for freight and passengers, shall be deemed, held and taken to be violations of this chapter and shall be illegal and void. 1899, c. 164, s. 6.

1109. PUBLISHED. All carriers shall, whenever required by the commission, file with it a schedule of the rates of charges for freight and passengers, and the commission is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules if they deem it advisable. 1899, c. 164, s. 7.

1110. INTERSTATE COMMERCE. Upon the complaint of any person to the commission of any unjust discrimination in carrying freight which comes from or goes beyond the boundaries of the state by any railroad company, whether organized under the laws of this state or of another state and doing business in this state, the commission shall investigate such complaint, and if the same be sustained it shall be the duty of the commission to bring such complaint before the interstate commerce commission for redress in accordance with the provisions of the act of Congress establishing the interstate commerce commission. They shall receive upon application the services of the attorney general of the state and he shall represent them before the interstate commerce commission. 1899, c. 164, s. 14.

1111. DUPLICATE FREIGHT RECEIPTS; CHARGES STATED; FREIGHT DELIVERED ON PAYMENT OF CHARGES. All railroad companies shall on demand issue duplicate freight receipts to shippers in which shall be stated the class or classes of freight shipped, the freight charges over the road giving the receipt, and so far as practicable shall state the freight charges over the roads that carry such freight. When the consignee presents the railroad receipts to the agent of the railroad that delivers such freight such agent shall deliver the articles shipped upon payment of the rate charged for the class of freight mentioned in the receipt. 1899, c. 164, s. 17.

1112. SCHEDULE OF RATES, EVIDENCE. The schedule containing rates fixed by the commission shall, in suits brought against any company wherein is involved the charges of any company for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be taken in all courts as *prima facie* evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads. All such schedules shall be received and held in all suits as *prima facie* evidence, the schedules of the commission without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the commission that the same is a true copy of the schedule prepared or approved by it for the railroad company or corporation therein named. 1899, c. 164, s. 7.

IX. DUTIES.

1113. NOTICE GIVEN OF VIOLATIONS; SUITS INSTITUTED. The commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the attorney general, who shall take such proceedings thereon as he may deem expedient. 1899, c. 164, s. 8.

1114. FEES PAID TO TREASURER. All license fees and seal tax and all other fees paid into the office of the corporation commission shall be turned into the state treasury; also all moneys received from fines and penalties. 1899, c. 164, ss. 33, 26.

1115. RECORD OF RECEIPTS AND DISBURSEMENTS. The commission shall keep a record showing in detail all receipts and disbursements. 1899, c. 164, s. 34.

1116. FISCAL YEAR. The fiscal year for which all reports shall be made which may be required of any railroad or transportation company by the commission under this chapter shall end on the thirtieth of June. 1899, c. 164, s. 28.

1117. REPORT OF COMMISSION. It shall be the duty of the commission to make to the governor annual reports of its transactions, and recommend from time to time such

legislation as it may deem advisable under the provisions of this chapter, and the governor shall have one thousand copies of such report printed for distribution. 1899, c. 164, s. 27.

1118. EXPENSES. All the expenses of the commission, except as otherwise provided by law, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders in making any investigation, or upon official business, or for any other purposes necessary for carrying out the provisions of this chapter, and necessary furniture, stationery, postage, lights and heat, shall be allowed, and the auditor shall issue his warrant upon presentation of itemized vouchers therefor approved by the chairman of the commission: Provided, that the expenses allowed under this section shall not exceed three thousand six hundred dollars annually. 1899, c. 164, s. 32; 1899, c. 688.

Note. For servant for commission, see s. 2762.

2600. MAP OF RAILROAD MADE AND FILED. Every railroad corporation shall, within a reasonable time after their road shall be constructed, cause to be made a map and profile thereof, and of the land taken or obtained for the use thereof, and file the same in the office of the corporation commission. Every such map shall be drawn on a scale and on paper to be designated by the corporation commission, and certified and signed by the president or engineer of such corporation. Code, s. 1977; 1871-2, c. 138, s. 41.

2614. FAST MAIL TRAINS AUTHORIZED; ONE TRAIN A DAY IN EACH DIRECTION REQUIRED. The corporation commission is hereby empowered, whenever it shall appear wise and proper to do so, to authorize any railroad company to run one or more fast mail trains over its road, which shall only stop at such stations on the line of the road as may be designated by the company: Provided, that in addition to such fast mail train said railroad shall run at least one passenger train in each direction over its road on every day except Sunday, which shall stop at every station on the road at which passengers may wish to be taken up or put off: Provided further, that nothing in this section shall be construed as preventing the running of local passenger trains on Sunday. 1893, c. 97.

2615. VESTIBULE FRONTS ON STREET RAILWAY CARS. All street passenger railway companies shall use vestibule fronts, of frontage not less than four feet, on all passenger cars run by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year: Provided, that such companies shall not be required to close the sides of the vestibules: Provided further, such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather, not to exceed four days in any one month within the period herein prescribed for use of vestibule fronts. The corporation commission is hereby authorized to make exemptions from the provisions of this section in such cases as in their judgment the enforcement of this section is unnecessary. 1901, c. 743.

2616. STREET RAILWAYS TO HAVE FENDERS IN FRONT OF PASSENGER CARS. All street passenger railway companies shall use practical fenders in front of all passenger cars run by them. The corporation commission is hereby authorized to make exemptions from the provision of this section in such cases as in their judgment the enforcement of this section is unnecessary. 1901, c. 743, s. 2.

2618. FIRST AND SECOND CLASS ACCOMMODATIONS. All railroad companies shall furnish first and second class passenger accomodations. 1899, c. 384, s. 4.

2619. SEPARATE ACCOMMODATIONS FOR DIFFERENT RACES. All railroad and steamboat companies engaged as common carriers in the transportation of passengers for hire, other than street railways, shall provide separate but equal accommodations for the white and colored races at passenger stations or waiting rooms, and also, on all trains and steamboats carrying passengers. Such accommodations may be furnished by railroad companies either by separate passenger cars or by compartments in passenger cars, which shall be provided by the railroads under the supervision and direction of the corporation commission: Provided, that this shall not apply to relief trains in cases of accident, to Pullman or sleeping cars, or through express trains that do not stop at all stations and are not used ordinarily for traveling from station to station, to negro

servants in attendance on their employers, to officers or guards, transporting prisoners, nor to prisoners so transported. 1899, c. 384; 1901, c. 213.

2620. CORPORATION COMMISSION MAY EXEMPT CERTAIN ROADS AND TRAINS. The corporation commission is hereby authorized to exempt from the provisions of the preceding section steamboats, branch lines and narrow-gauged railroads and mixed trains carrying both freight and passengers, if in its judgment the enforcement of the same be unnecessary to secure the comfort of passengers by reason of the light volume of passenger traffic, or the small number of colored passenger travelers on such steamboats, narrow-gauged, branch lines or mixed trains. 1899, c. 384, s. 2; 1901, c. 213.

2621. WHEN TWO RACES PUT IN SAME COACH. When any coach or compartment car for either race shall be completely filled at a station where no extra coach or car can be had, and the increased number of passengers could not be foreseen, the conductor in charge of such train may assign and set apart a portion of a car or compartment assigned for passengers of one race to passengers of the other race. 1899, c. 384, s. 3.

2622. PENALTY FOR FAILING TO PROVIDE SEPARATE CARS. Any railroad company failing to comply in good faith with the provisions of the three preceding sections shall be liable to a penalty of one hundred dollars per day, to be recovered in an action brought against such company by any passenger on any train or boat of any railroad or steamboat company which is required by this chapter to furnish separate accomodations to the races, who has been furnished accommodations on such railroad train or steamboat in only a car or compartment with a person of a different race in violation of law. 1899, c. 384, s. 5.

2630. FREIGHT RATES POSTED. It shall be the duty of all railroad and other transportation companies to keep posted in a conspicuous place in their depots or places where freight is received for shipment a list of its charges for carrying freight, specifying name of place, class of freight and charge for carrying the same. Such charges shall not be increased without giving fifteen days' notice, and the company represented by any agent refusing to comply with this section

shall be liable to a penalty of not less than fifty nor more than one hundred dollars. Code, s. 1965; 1879, c. 182, s. 2.

2631. PENALTY FOR FAILURE TO RECEIVE. Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or workhouse (*sic*) at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment. Code, s. 1964; 1903, cc. 444, 693.

2632. FAILURE TO TRANSPORT IN REASONABLE TIME; REASONABLE TIME DEFINED; FORFEITURE. It shall be unlawful for any railroad company, steamboat company, express company of other transportation company doing business in this state to omit or neglect to transport within a reasonable time any goods, merchandise or articles of value received by it for shipment and billed to or from any place in the state of North Carolina, unless otherwise agreed upon between the company and the shipper or unless same be burned, stolen or otherwise destroyed, or unless otherwise provided by the North Carolina corporation commission. Each and every company violating any of the provisions of this section shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities there shall be a forfeiture in like manner of twelve and fifty one-hundredth dollars for the first day and two and fifty one-hundreth dollars for each succeeding day;

Provided, the forfeiture shall not be collected for a period exceeding thirty days. In reckoning what is reasonable time for such transportation it shall be considered that such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations; and a delay of two days at the initial point and forty-eight hours at one intermediate point for each hundred miles of distance or fractions thereof over which said freight is to be transported shall not be charged against such transportation company as unreasonable and shall be held to be prima facie reasonable, and a failure to transport within such time shall be held to be prima facie unreasonable. 1903, c. 590, s. 3; 1905, c. 545.

2633. PAID AT CLASSIFIED RATES; PENALTY FOR OVERCHARGE. All common carriers doing business in this state shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classifications and rates made and filed with the interstate commerce commission in case of shipments from without the state and with those of the corporation commission of this state in case of shipments wholly within this state, by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carriers to inform any consignee or consignees of the correct amount due for freight according to such classification and rates, and upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates such common carrier shall deliver the freight in question to consignee or consignees, and any failure or refusal to comply with the provisions hereof shall subject such carrier to failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee or consignees aggrieved by any suit in any court of competent jurisdiction. 1905, c. 330.

2634. TIME WITHIN WHICH LOSS OR DAMAGE MUST BE PAID; PENALTY; AMOUNT OF RECOVERY; ACTIONS UNITED; REMEDY CUMULATIVE. Every claim for loss of or damage to property while in possession of a common carrier shall be

adjusted and paid within sixty days in case of shipments wholly within this state, and within ninety days in case of shipments from without the state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment or point of delivery to another common carrier: Provided, that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee aggrieved in any court of competent jurisdiction: Provided, that unless such consignee recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid. Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto and for the penalties herein provided for may be united in the same complaint. 1905, c. 330, ss. 2, 4, 5.

2635. EXISTING REMEDIES CONTINUE. The preceding section shall not deprive any consignee of any rights or remedies now existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon said common carrier. 1905, c. 330, s. 3.

2636. CARRIER'S RIGHT AGAINST OTHER CARRIER. Any common carrier, upon complying with the provisions of the two preceding sections, shall have all the rights and remedies herein provided for against a common carrier from which it receives the freight in question. 1905, c. 330, s. 3.

2641. CHARGES ON PARTIAL FREIGHT DELIVERIES. Whenever any freight of any kind shall be received by any common carrier in this state to be delivered to any consignee in this state, and a portion of the same shall not have been received at the place of destination, it shall not be lawful for the carrier to demand any part of the charges for freight or trans-

portation due for such portion of the shipment as shall not have reached the place of destination. The carrier shall be required to deliver to the consignee such portion of the consignment as shall have been received upon the payment or tender of the freight charges due upon such portion. But nothing in this section shall be construed as interfering with or depriving a consignor, or other person having authority, of his rights of stoppage in transitu. 1893, c. 495.

2642. NOT TO RECEIVE MORE THAN TARIFF RATE. No railroad, steamboat, express or other transportation company engaged in the carriage of freight, and no telegraph company or telephone company shall demand, collect or receive for any service rendered or to be rendered in the transportation of property or transmission of messages, more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law. 1903, c. 590.

2643. OVERCHARGE ON TARIFF RATES REFUNDED. In case of any overcharge, contrary to the preceding section, the person aggrieved may file with any agent of the company collecting or receiving greater compensation than the amount allowed in the preceding section a written demand supported by a paid freight bill and an original bill of lading or duplicate thereof for refund of overcharge, and a maximum period of sixty days shall be allowed such company to pay claims filed under this section. 1903, c. 590, s. 2.

2644. PENALTY FOR FAILURE TO REFUND OVERCHARGE. Any company failing to refund such overcharge, within the time allowed, shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars per day for each day's delay thereafter until said overcharge is paid, together with all costs incurred by the party aggrieved: Provided, the total forfeiture shall not exceed one hundred dollars. 1903, c. 590, s. 2.

3749. DISCRIMINATION IN CHARGES. If any common carrier shall directly or indirectly by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of law than it charges, demands or collects or receives from any other per-

son or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; or shall make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or shall subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such person or corporation shall be upon conviction thereof fined not less than one thousand nor more than five thousand dollars for each and every offense. 1899, c. 164, s. 13.

3751. DISCRIMINATION AGAINST CONNECTING LINES. If any common carrier shall not afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freights to and from their several lines and those connecting therewith, or shall discriminate in their rates and charges against such connecting lines, or if any connecting lines shall not make as close connections as practicable for the convenience of the traveling public, or shall not obey all rules and regulations made by the corporation commission relating to trackage, it shall be punished by a fine of not less than five hundred dollars nor exceeding five thousand dollars for each and every offense. 1899, c. 164, s. 21.

3762. POOLING FREIGHTS. If any person shall be concerned in pooling freights or shall directly or indirectly allow or accept rebates on freights he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one thousand dollars or imprisoned not less than twelve months. Code, s. 1968; 1879, c. 237, s. 2.

3768. UNREASONABLE RATES. If any railroad doing business in this state shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track or any of the branches thereof, or upon any railroad in this state which has the right, license or permission to use, operate or control the same, it shall be

deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than five hundred nor more than five thousand dollars. 1899, c. 164, s. 12.

3800. STREET CARS TO HAVE VESTIBULE FRONTS. If any city and street passenger railway company shall refuse or fail to use vestibule fronts, or frontage not less than four feet, on all passenger cars run, manipulated or transported by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year, except in cases of temporary emergency in suitable weather, not to exceed four days in any one month within the period herein prescribed for use of vestibule fronts, such company shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each day: Provided, that said companies shall not be required to close the sides of said vestibules. The North Carolina corporation commission is hereby authorized to make exemptions from the provisions of this section in such cases as in their judgment the enforcement of this section is unnecessary. 1901, c. 743, s. 1.

3801. STREET CARS TO HAVE FENDERS. If any city and street passenger railway company shall refuse or fail to use practical fenders in front of all passenger cars run, manipulated or transported by them, such company shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each day. The North Carolina corporation commission is hereby authorized to make exemptions from the provisions of this section in such cases as in their judgment the enforcement of this section is unnecessary. 1901, c. 743, s. 2.

1119. TAX COMMISSIONERS. The members of the corporation commission shall constitute a board of "State Tax Commissioners," with the powers and duties prescribed by law. 1901, c. 7, ss. 1, 3; 1903, c. 251, ss. 1, 3.

1120. OATH OF OFFICE. The members of said board shall take and subscribe the constitutional oath of office, to be filed with the Secretary of State. 1905, c. 590, s. 3.

1121. CLERKS TO; AND COMPENSATION. Said board may employ such clerks as in their judgment they may deem necessary to put into proper execution the provisions of this subchapter. The persons so elected shall hold office during the pleasure of said board, and a record of all the proceedings of said board shall be kept, which record, with all other papers or proceedings of said board, shall be a part of the record of the board of corporation commissioners, and of which the clerk of said board of corporation commissioners shall be the lawful custodian, and who, when the board is not in session, shall also have oversight of the clerical force and have performed such duties as are directed by the board. 1905, c. 590, s. 2.

1122. WHEN TO MEET; SPECIAL MEETINGS. Said board shall hold regular meetings on the first Tuesday of March, June, July, August, September, and October of each year, unless said dates are changed by order of the board, of which changes due notice shall be given, and may hold adjourned sessions as may be deemed necessary by it for the proper performance of the duties devolving upon said board. The chairman may call special sessions of the board whenever and wherever in the state he may deem it advisable so to do, and shall call such special sessions upon the written request of two members. 1905, c. 590, s. 5.

1123. EXAMINATION OF RECORDS, ETC. The said board, and the members thereof, shall have access to all books, papers, documents, statements and accounts on file or of record in any of the departments of state, subject to the rules and regulations of the respective departments relative to the care of the public records. It shall have like access to all books, papers, documents, statements and accounts on file or of record in counties, townships and municipalities. Said board shall have the right to subpœna witnesses, upon a subpœna signed by the chairman of said board, directed to such witnesses, which subpœna may be served by any person authorized to serve subpœnas from courts of record in this State, and the attendance of witnesses may be compelled by attachment to be issued by any superior court upon proper showing that such witness has been properly subpœnaed and has refused to obey such subpœna. The person serving such subpœna shall receive the same compensation now al-

lowed to sheriffs and other officers for serving subpœnas. Said board shall have power to examine witnesses under oath, said oath to be administered by any member of said board of by the secretary thereof. 1905, c. 590, s. 4.

1124. DUTIES OF. 1. To have and exercise general supervision over the taxlisters and assessing officers of this state, and to take such measures as will secure the enforcement of the provisions of this subchapter, to the end that all the properties of this state liable to assessment for taxation shall be placed upon the assessment rolls and assessed at their true value in money.

2. To confer with and advise assessing officers as to their duties under this subchapter, and to institute proper proceedings to enforce the penalties and liabilities provided by law for public officers, officers of corporations and individuals failing to comply with this subchapter; to prefer charges to the governor against assessing and taxation officers who violate the law or fail in the performance of their duties in reference to assessments and taxation; and in the execution of these powers the said board may call upon the attorney general or any prosecuting attorney in the state to assist said board.

3. To receive complaints as to property liable to taxation that has not been assessed or has been fraudulently or improperly assessed, and to investigate the same, and to take such proceedings as will correct the irregularity complained of, if found to exist.

4. To see that each county in the state be visited by at least one member of the board as often as is necessary, to the end that all complaints concerning the law of assessment and taxation may be heard; that information concerning its workings may be collected; that all assessing and taxation officers comply with the law, and all violations thereof be punished, and that all proper suggestions as to amendments and change may be made.

5. To require from any register of deeds, clerk of court, mayor and clerk of towns, or any other officer in this state, on forms prescribed by said board of state tax commissioners, such annual or other reports as shall enable said board to ascertain the assessed valuations of all property listed for taxation throughout the state under this subchapter; the

amount of taxes assessed, collected and returned delinquent and such other matter as the board may require, to the end that it may have complete and statistical information as to the practical operation of this subchapter. That every such officer mentioned in this section who shall wilfully neglect or refuse to furnish any report required by the commission, for the purposes of this subchapter, or who shall wilfully and unlawfully hinder, delay or obstruct said commission in the discharge of its duties, shall forfeit and pay one hundred dollars for each offense, to be recovered in an action in the name of the state. A delay of ten days to make and furnish such report shall raise the presumption that the same was wilfull.

6. To make diligent investigation and inquiry concerning the revenue laws and systems of other states and countries, so far as the same is made known by published reports and statistics, and can be ascertained by correspondence with offi cers thereof, and, with the aid of information thus obtained, together with experience and observation of our own laws, to recommend to the general assembly at each regular session thereof such amendments, changes or modifications of our revenue laws as seem proper and necessary to remedy injustice and irregularities in taxation, and to facilitate the assessment and collection of public revenues.

7. To further report to the general assembly at each regular session thereof, or at such other times as the general assembly may direct, the whole amount of taxes collected in the state for all purposes, classified as to state, county, township and municipal purposes, with the sources thereof, the amount lost, the cause of the loss, the proceedings of said board, and such other matters of information concerning the public revenues at it may deem of public interest. 1905, c. 590, s. 6.

1125. LIST OF TAXABLES, HOW REVISED BY. After the various tax lists required to be made under this chapter shall have been passed upon by the county board of equalization, the said several tax lists shall be subject to inspection by the said board of state tax commissioners or by any member thereof; and in case it shall appear or be made to appear to said board that property subject to taxation has been omitted from said list, the board may issue an order directing the

assessor or lister, whose assessments or failure to assess are complained against, to appear with his tax list at a time and place to be stated in said order, and the place to be at the office of the board of county commissioners at the county-seat, or such other place in said county in which said roll was made, as said board shall deem most convenient for the hearing herein provided for. A notice of the time and place that said assessor or lister is ordered to appear with said list shall be published in a newspaper published at the county-seat in said county, if there be one; if not, in some paper printed in said county, if there be any, at least five days before the time at which said assessor or lister is required to appear, and personal notice shall be given by mail to said persons whose property or whose assessments are to be considered, at least five days prior to said hearing. A copy of said order shall be served upon the tax officer in whose possession said list shall be, at least three days before he is required to appear with said list. The said board, or any member thereof, shall appear at the time and place mentioned in said order, and the assessing or listing officer upon whom said notice shall have been served shall appear also with said tax list. The said board or any member thereof, as the case may be, shall then and there hear and determine as to the proper assessments of all property and persons mentioned in said notice, and persons affected or liable to be affected by the review of said assessments thus provided for may appear and be heard at said hearing. In case said board, or the member thereof who shall act in said review, shall determine that the assessments so reviewed are not assessed according to law, he or they shall, in a column provided for that purpose, place opposite said property the true and lawful assessment of the same. As to the property not on the tax list, the said board or members thereof acting in said review shall place the same upon said tax list by proper description, and shall place thereafter in the proper column the true cash value of the same. In case of review under this section, the said board or the member thereof acting in said review shall certify under his hand officially and spread upon said list a certificate of the day and date at which said tax list was reviewed by him, and the changes made by him therein. For appearing with said list as required herein, the tax officer shall receive the same

pay per diem as is received by him in the preparation of the tax list, to be presented to and paid by the proper officers of the county or municipality of which he is the assessing officer in the manner as his other compensation is paid. The action of said board or member taken as provided in this subchapter shall be final. 1905, c. 590, s. 8.

1125a. GENERAL REVIEW OF TAX LIST; HOW AND WHEN ORDERED. In case it shall appear or be made to appear to said board that any tax list in the state is so grossly irregular and unlawfully assessed that adequate compliance with the law can not be secured except by a general review of said tax list, said board may make and issue an order that said tax list shall be subject to general review, and the time and place shall be stated in said order at which said list shall be reviewed, and under said order the assessor whose assessment or failure to assess is complained against shall be required to appear with his tax list at the time and place thus determined, said time to be not less than fourteen days from the issuance of the order, and the place to be at the office of the board of county commissioners at the county-seat, or such other place in said county in which said list was made, as said board shall deem most convenient for the hearing herein provided for. A notice of the time and place that said assessor is required to appear with said list, together with a statement that said list will be subjected to general review, and that all persons interested therein may be heard at said time, shall be published in a newspaper published at the county-seat of said county, if there be one; if not, in some newspaper printed in said county, if there be any, at least seven days before the time at which said assessor is required to appear. A copy of the order made as aforesaid shall be served upon the tax officer in whose possession said list shall be, at least three days before he is required to appear with said list. The said board or any member thereof shall appear at the time and place mentioned in said order, and the tax officer upon whom said notice shall have been served shall appear also with said tax list. The said board or any member thereof, as the case may be, together with the chairman of the board of county commissioners, shall then and there review said tax list and the assessment of property therein, and he or they shall have power to determine in

accordance with law the amount at which said assessment shall be placed, and to change the same so that said assessments may comply with the law. Also to place upon said list property omitted therefrom in the same manner as provided in the last preceding section. The determination of said board or members thereof, acting in said review, shall be placed in a column provided for that purpose, and they or he shall proceed in all respects as provided in the last preceding section, and the tax officer shall receive the same compensation as provided in said section. 1905, c. 590, s. 9.

1126. PROPERTY UNLISTED, HOW LISTED BY. If it shall appear to said board at any time that any property liable to taxation has not been assessed for any previous year as hereinbefore provided, the said board shall report the same to the proper assessing officer, and the same shall be listed for taxation upon the next tax list that shall be made, and shall be valued as all other property. The said board shall further certify to the board of county commissioners of the several counties at the October session thereof next after said property shall be then listed for taxation, and said board of county commissioners shall ascertain the rate of taxation for said several years, and shall order the taxes for said several years to be entered against said property upon the valuation for the then current year, and the same shall be so entered in a column provided for that purpose, and it shall constitute a charge against the person or property and be collected as other taxes: Provided, however, that this provision shall not be deemed to relate back prior to the first day of March, one thousand nine hundred and five: Provided further, that in case of change of ownership of the property omitted, said taxes shall not be entered against said property prior to the last change of ownership. 1905, c. 590, s. 10.

1127. REPORT TO THE GOVERNOR, WHEN; HOW DISTRIBUTED. The board of state tax commissioners shall, on or before the first day of November of each year, make an annual report to the governor of the state, setting forth the workings of said commission during the preceding year, and containing the findings and recommendations of said commission in relation to all matters of taxation. The state auditor shall cause two thousand copies of said report to be printed on or before the first day of December succeeding the mak-

ing of said report. Five hundred copies of said report shall be placed at the disposal of the state librarian for distribution and exchange, and a copy of said report shall be forwarded by said tax commission to each member of the general assembly as soon as printed. 1905, c. 590, s. 7.

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246).

3792. TAX COMMISSIONERS MAY EXAMINE BOOKS. If any corporation, firm or individual shall, upon demand, refuse to permit the state tax commissioners, or any one of them, to examine the books, papers and accounts of such corporation, firm or individual, for the purpose of obtaining information as to property liable to be assessed for taxation, under any of the laws of this state; or if any person shall refuse to appear before the state tax commissioners, or any member thereof, when subpœnaed so to do, or shall upon such appearance fail or refuse to testify, he shall be guilty of a misdemeanor, and fined not exceeding one thousand dollars, or imprisoned in the state's prison not exceeding two years, or both, in the discretion of the court. 1901, c. 7, s. 4; 1903, c. 251, s. 4.

BANKING LAWS.

[REVISAL OF 1905.]

BANKS.

CHAPTER 7.

		Sections.
I.	Creation,	222—227
II.	Powers and duties,	228—234
III.	Stockholders,	235—239
IV.	Corporation commission,	240—245
V.	Bank examiners,	246—251

I. CREATION.

222. HOW INCORPORATED. Any number of persons, not less than three, who may be desirous of forming a company, and engaging in the business of establishing, maintaining and operating banks of discount and deposit to be known as commercial banks, or of engaging in the business of establishing, maintaining and operating offices of loan and deposit to be known as savings banks, or of establishing, maintaining and operating banks having departments for both classes of business, shall be incorporated in the manner following, and in no other way; that is to say, such persons shall, by a certificate of incorporation, under their hands and seals, set forth:

1. The name of the corporation; no name shall be assumed already in use by another existing corporation organized under the laws of this state or of the Congress, or so nearly similar thereto as to lead to uncertainty or confusion.

2. The location of its principal office in the state.

3. The nature of its business, whether that of commercial bank, or savings bank, or both.

4. The amount of the total authorized capital stock, the number of shares into which it is divided, and the par value of each share, which shall be either fifty dollars or one hundred dollars; the amount of capital stock with which it will

commence business, which shall not be less than five thousand dollars in cities and towns of fifteen hundred population or less; nor less than ten thousand dollars in cities and towns whose population exceeds fifteen hundred but does not exceed five thousand; nor less than twenty-five thousand dollars in all other places; the population to be ascertained by the last preceding national census; and if there be more than one class of stock, a description of the different classes, with the terms on which the respective classes of stock are created.

5. The names and postoffice addresses of the subscribers for stock and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of the capital stock with which the company will commence business.

6. The period, if any, limited for the duration of the company.

1903, c. 275, ss. 1, 2; 1901, c. 769.

223. CERTIFICATES OF INCORPORATION; HOW SIGNED, PROVED AND FILED. The certificate of incorporation shall be signed by the original incorporators, or a majority of them, and shall be proved, or acknowledged, before an officer duly authorized under the laws of this state to take the proof or acknowledgment of deeds. Such certificate of incorporation, when so proved, shall be filed in the office of the secretary of state, who shall, if the same shall be in accordance with law, thereupon cause the same to be recorded in his office in a book to be kept for that purpose, and known as the Corporation Book, and he shall, upon the payment of the organization tax and fees, certify under his official seal two copies of the said certificate of incorporation and probates, one of which shall be forthwith recorded in the office of the clerk of the superior court of the county where the principal office of said corporation in this state shall, or is to be, established, in a book to be known as the Record of Incorporations, and the other certified copy shall be filed in the office of the corporation commission, and thereupon the said persons shall become a body politic and corporate under the name stated in such certificate. The said certificate of incorporation or a copy thereof duly certified by the secretary of state or by the clerk of the superior court of the county

in which the same is recorded, or by the clerk of the corporation commission, under their respective seals, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established. 1903, c. 275, s. 3; 1901, c. 2, s. 9; 1903, c. 343.

224. PAYMENT OF CAPITAL STOCK. At least fifty per cent of the capital stock of every bank shall be paid in in cash before it shall be authorized to commence business and the remainder of the capital stock of such bank shall be paid in monthly instalments of at least ten per cent in cash of the whole of the capital, payable at the end of each succeeding month from the time it shall be authorized by the corporation commission to commence business, and the payment of each instalment shall be certified to the corporation commission, under oath, by the cashier or president of the bank. 1903, c. 275, s. 10.

225. STATEMENT FILED BEFORE BEGINNING BUSINESS. Before such company shall begin the business of banking there shall be filed with the corporation commission a statement, under oath, by the cashier or president, containing the names of all of the directors and officers, with the date of the election or appointment, term of office, residence and post-office address of each, the amount of capital stock of which each is the owner in good faith, and the amount of money paid in on account of the capital stock. Nothing shall be received in payment of capital stock but money. 1903, c. 275, ss. 5, 10.

226. AUTHORIZED TO BEGIN BUSINESS, WHEN AND HOW. If from such statement, or upon an examination, if such examination appears necessary, it appears to the corporation commission that such corporation is lawfully entitled to commence the business of banking, it shall, within thirty days after the filing of the certificate required by law, give to such corporation a certificate signed by the chairman of the corporation commission, attested by the secretary of the commission, that such corporation has complied with all the provisions required to be complied with before commencing the business of banking and that such corporation is authorized to commence such business. 1903, c. 275, s. 7.

227. AUTHORITY TO BEGIN BUSINESS WITHHELD, WHEN. The corporation commission may withhold from any bank its certificate authorizing the commencement of business whenever it has reason to believe that the stockholders have formed the same for any other purpose than the legitimate objects contemplated by this chapter. 1903, c. 275, s. 6.

II. POWERS AND DUTIES.

228. POWERS. In addition to the powers conferred by law upon private corporations, banking corporations shall have power—

1. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debts, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security or real or personal property. Such corporation at the time of making loans or discounts may take and receive in advance such interest as may be agreed upon not exceeding the legal rate.

2. To purchase, hold and convey real estate for the following purposes:

1st. Such as shall be necessary for the convenient transaction of its business, including with its banking offices other apartments to rent as a source of income, which investment shall not exceed twenty-five per cent of its paid-in capital stock and permanent surplus: Provided, that this provision shall not apply to any such investment made before the ninth day of March, one thousand nine hundred and three.

2d. Such as is mortgaged to it in good faith by way of security for loans made or money due to such bank.

3d. Such as is conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4th. Such as it acquires by sale under execution or judgment of any court in its favor.

1903, c. 275, ss. 8, 9.

229. WHEN BANK MAY PURCHASE ITS STOCK. No bank shall be the holder as pledgee or as purchaser of any portion

of its capital stock, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith. 1903, c. 275, s. 1.

230. REORGANIZATION. Whenever any bank, under the laws of this state or of the United States, is authorized to dissolve and shall have taken the necessary steps to effect dissolution, it shall be lawful for a majority of the directors of such bank, upon the authority in writing of the owners of two-thirds of its capital stock, with the approval of the corporation commission, to execute articles of incoporation as provided in this chapter, which articles, in addition to the requirements of law, shall further set forth the authority derived from the stockholders of such dissolved national bank or state bank, and upon filing the same as hereinbefore provided for the organization of banks, the same shall become a bank under the laws of this state, and thereupon all assets, real and personal, of the dissolved national bank shall by operation of law be vested in and become the property of such state bank, subject to all liabilities of such national bank not liquidated under the laws of the United States before such reorganization. 1903, c. 275, s. 17.

231. RESERVE FUND. Every bank shall at all times have on hand as a reserve in available funds an amount equal to at least fifteen per cent of the aggregate amount of its deposits. Two-fifths of such fifteen per cent shall be cash in the vaults of the bank. Savings banks shall have on hand at all times, as a reserve in available funds, an amount equal to at least five per cent of their aggregate deposits 1903, c. 275, s. 28.

232. AVAILABLE FUNDS; WHEN BELOW RESERVE; NO NEW LOANS OR DIVIDENDS. The available funds shall consist of cash on hand and balances due from other solvent banks. Cash shall include lawful money of the United States, and exchange for any clearing-house association. Whenever the available funds of any bank shall fall below the reserve herein required, such bank shall not make any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight; nor shall such bank make any dividends of its profits until it has on hand the available funds required by this chapter. 1903, c. 275, s. 29.

233. LOANS TO ONE PERSON NOT TO EXCEED TEN PER CENT OF CAPITAL. The total liabilities to any bank or banking institution, of any person, or of any company, corporation or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such bank or banking institution actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed. This section shall not apply to banks with a paid-up capital of one hundred thousand dollars or less. 1897, c. 298, s. 3; 1897, c. 432.

234. CHAPTER ON CORPORATIONS APPLICABLE. All of the provisions of law relating to private corporations, and particularly those enumerated in the chapter entitled Corporations, not inconsistent with this chapter, or with the business of banking, shall be applicable to banks. 1903, c. 275, s. 4.

III. STOCKHOLDERS.

235. INDIVIDUAL LIABILITY OF. The stockholders of every bank organized under the laws of North Carolina, whether under the general law or by special act, shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation, to the extent of the amount of their stock therein at par value thereof, in addition to the amount invested in such shares. The term "stockholder," when used in this chapter, shall apply not only to such persons as appear by the books of the corporation to be stockholders, but also to every owner of stock, legal or equitable, although the same may be on such books in the name of another person; but shall not apply to a person who may hold the stock as collateral security for the payment of a debt. 1903, c. 275, s. 13; 1897, c. 298.

236. EXEMPTIONS IN SPECIAL CHARTERS REPEALED. Any exemption from the individual liability imposed upon stockholders by the preceding section contained in the charter of

any bank incorporated prior to the first day of January, one thousand nine hundred and five, is repealed. 1897, c. 298, s. 2.

237. EXECUTORS, TRUSTEES, ETC., NOT PERSONALLY LIABLE. Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any libilities as stockholders, but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be if living and competent to act and hold the stock in his own name. U. S. Rev. Stat., s. 5152.

238. TRANSFERER NOT LIABLE, WHEN. No person who has in good faith and without any intent to evade his liability as a stockholder, transferred his stock on the books of the corporation to any person of full age, previous to any default in the payment of any debt or liability of the corporation, shall be subject to any personal liability on account of the non-payment of such debt or liability of the corporation, but the transferee of any stock so transferred previous to any default shall be liable for any such debt or liability of the corporation to the extent of such stock, in the same manner as if he had been the owner at the time the corporation contracted such debt or liability. 1903, c. 275, s. 14.

239. STOCK SOLD IF SUBSCRIPTION UNPAID. Whenever any stockholder or his assignee fails to pay any instalment on the stock, when the same is required by law to be paid, the directors of the bank may sell the stock of such delinquent stockholder at public sale, as they shall deem best, having first given the delinquent stockholder twenty days' notice, personally or by mail, at his latest known address. If no party can be found who will pay for such stock the amount due thereon to the bank, with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank and such stock shall be sold as the directors may order within six months of the time of such forfeiture, and if not sold, it shall be cancelled and deducted from the capital of the bank. 1903, c. 275, s. 11.

IV. CORPORATION COMMISSION.

240. MAY MAKE RULES. The corporation commission shall have power to make such rules for the government of the banks and banking institutions of this state, not inconsistent with law, as may in its judgment seem wise and expedient. 1903, c. 275, s. 20.

241. ALL BANKING INSTITUTIONS UNDER SUPERVISION OF. Every bank, corporation, partnership, firm or individual, now or hereafter transacting a banking business under the laws of, and within, this state, shall be subject to the provisions of this chapter and regulated by and be under the supervision of the corporation commission. 1903, c. 275, s 19.

242. QUARTERLY REPORTS TO; PUBLICATION IN COUNTY. Every bank and every corporation, partnership, firm or individual transacting a banking business shall make to the corporation commission not less than four reports during each year, according to the form which may be prescribed by said commission; which reports shall be verified in the case of incorporated banking companies by the oath or affirmation of the president, vice-president or cashier, and, in addition, two of the board of directors, and in other cases by the oath or affirmation of the partners, members of the firm or individual owner. The bank, corporation or individual making such report shall publish same in some newspaper in the county in which such bank, corporation or individual is located. 1903, c. 275, s. 21.

243. SPECIAL REPORTS. The corporation commission shall have power to call for special reports from any bank, corporation, firm or individual transacting a banking business whenever necessary, in order to obtain a full and complete knowledge of such bank. 1903, c. 275, s. 22.

244. ANNUAL REPORT OF STOCKHOLDERS. Every bank shall at all times keep a correct record of the names of all its stockholdesrs, and once in each year, or whenever called upon, file in the office of the corporation commission a correct list of all of its stockholders, with the number of shares held by each. 1903, c. 275, s. 16.

245. PENALTY FOR FAILURE TO REPORT, ETC. Every bank, corporation, partnership, firm or individual that shall refuse, fail or neglect to make any report, or any published statement required by the provisions of this chapter shall be subject to a penalty of two hundred dollars. The penalty herein provided for shall be recovered by the state in a civil action in any court of competent jurisdiction, and it shall be the duty of the attorney general to prosecute all such actions. 1903, c. 275, s. 26.

V. BANK EXAMINERS.

246. APPOINTED BY CORPORATION COMMISSION. The corporation commission shall appoint a suitable person or persons to make an examination of and into the affairs of every bank, corporation or individual doing a banking business, as often as shall be deemed necessary and proper, and at least once every year. And it shall also be the duty of the said bank examiner to verify the report made by the directors or members or individual conducting any banking institution as required by section two hundred and twenty-six. The corporation commission may at any time remove any person appointed by it. 1903, c. 275, s. 23; 1905, c. 539.

247. POWERS. Such examiners shall have power to make a thorough examination into all the books, papers and affairs of the bank or corporation, firm or individual transacting a banking business, and, in so doing, to administer oaths and affirmations and to examine on oath or affirmation any individual banker and the officers, agents, partners and clerks of such bank, corporation, firm or individual touching the matters he or they shall be authorized and directed to inquire into, and examine, and to summon, and by attachment compel the attendance of any person or persons in this state to testify under oath before him or them in relation to the affairs of such corporation, partnership, firm or individual. 1903, c. 275, s. 24.

248. REPORTS BY, TO CORPORATION COMMISSION. Bank examiners shall make a full and detailed report in writing to the corporation commission, of the condition of each corporation, partnership, firm or individual doing a banking business, within ten days after each and every examination made by them. 1903, c. 275, s. 24.

249. ANNUAL EXAMINATIONS; EXPENSES PAID BY BANK. One examination each year shall be designated as the annual examination, and for such examination the bank, corporation, or individual so examined shall pay into the office of the corporation commission, to be paid to the examiners, an examination fee, as follows: Banks, banking institutions or individuals doing a banking business, having a capital of twenty-five thousand dollars or less, shall pay a fee of fifteen dollars; those having a capital stock of more than twenty-five thousand dollars and not over fifty thousand dollars, twenty-five dollars; those having a capital stock of over fifty thousand dollars, thirty dollars. The expenses incurred and services, other than examinations performed specially for any bank, shall be paid by such bank or banking institution. No bank shall be compelled to pay for more than one examination in each year, unless it shall appear that the condition of such bank, banking institution or banker is precarious, or in any way unsatisfactory, then it shall be the duty of the commission to order a special examination, which shall be paid for by such bank at the same rates as the annual examinations. 1903, c. 275, s. 25.

250. TAKE POSSESSION OF BANK, WHEN; RECEIVER APPOINTED, HOW. Any bank examiner who has filed such bond as may be required by the commission, when ordered by the commission, shall have authority to take possession of any bank doing business under the laws of this state and retain possession thereof for a time sufficient to make a thorough examination into its affairs and financial condition; and in case it is found by the examiner, upon such examination, that such bank is insolvent or is conducting its business in an unsafe and unauthorized manner, or is jeopardizing the interests of its depositors, then such examiner, when authorized by the corporation commission, shall have full power and authority to take, hold and retain possession of all the money, rights, credits, assets and property of every description belonging to such bank, corporation, partnership, firm or individual, until the corporation commission can receive and act on the report made by the examiner of such bank, and have a receiver appointed, for the purpose of winding up and settling the affairs of such bank, banking institution or banker, according to law; and the corporation commission is hereby

empowered, in its own name, to institute and maintain civil actions for the appointment of receivers in such cases, and for such other relief as may be necessary or proper to protect the creditors of such bank. The commissioners in their judgment may grant such bank, corporation or individual sixty days in which to correct any errors or irregularities, and make good any deficiencies or losses shown in any reports or otherwise. 1903, c. 275, s. 30.

251. MAY MAKE ARRESTS, WHEN. When it shall appear to any bank examiner, by examination or otherwise, that any officer, agent, employee, director, stockholder or owner of a bank or banking institution has been guilty of a violation of the criminal laws of the state relating to banks and banking institutions, it shall be his duty to hold and detain such person until a warrant can be procured for his arrest; and for such purpose such examiner shall have and possess all the powers of a peace officer of such county, and may arrest without warrant for past offenses. Upon report of his action to the corporation commission, it may direct the release of the person so held, or, if in its judgment such person should be prosecuted, the commission shall cause the solicitor of the judicial district in which such detention is had to be promptly notified, and the action against such person shall be continued a reasonable time to enable such solicitor to be present at the trial.

3324. EXAMINER MAKING FALSE REPORT. If any bank examiner shall knowingly and willingly make any false or fraudulent report of the condition of any bank which shall have been examined by him, with the intent to aid or abet the officers, owners or agents of such bank in continuing to operate an insolvent bank; or if any such examiner shall receive or accept any bribe or gratuity, given for the purpose of inducing him not to file any report of an examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state's prison for not less than four months nor more than ten years. 1903, c. 275, s. 24.

3325. OFFICERS AND AGENTS, MALFEASANCE OF. If any president, director, cashier, teller, clerk or agent of any bank or other corporation shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the bank, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the bank with the intent in either case to injure or defraud or to deceive any officer of the bank, or if any person shall aid and abet in the doing of any of these things, he shall be guilty of a felony, and upon conviction shall be imprisoned in the state's prison for not less than four months nor more than fifteen years, and likewise fined, at the discretion of the court. 1903, c. 275, s. 15.

3326. STATEMENTS, MAKING FALSE. If any person shall wilfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any bank, corporation, partnership, firm or individual transacting a banking business, or shall knowingly subscribe to or exhibit false papers, with the intent to deceive any person authorized to examine into the affairs of said bank, corporation, partnership, firm or individual, or shall wilfully and knowingly make, state or publish any false statement of the amount of the assets or liabilities of any such corporation, partnership, firm or individual, he shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the state's prison not less than four months nor more than ten years. 1903, c. 275, s. 27.

5371. (4.) The corporation commission and the bank examiners when so required by the state treasurer shall keep the state treasurer fully informed at all times as to the condition of all such depository banks, so as to fully protect the state from loss. 1905, c. 520.

Rules of Practice
IN
CASES AND PROCEEDINGS
BEFORE THE COURT OF THE NORTH CAROLINA CORPORATION COMMISSION.

PUBLIC SESSIONS.

1. The general sessions of the court for the hearing of contested cases will be held at its office in the agricultural building, Raleigh, N. C., on the first Wednesday of each month at 11 o'clock a. m. When special sessions are held at other places such regulations as may be necessary will be made by the court.

PARTIES.

2. Where a complaint concerns anything done or omitted to be done by only a single carrier no other need be made a party, but if it relates to joint tariffs, or matters in which two or more carriers doing business under a common control, management or arrangement for a continuous carriage or shipment, are interested, all the carriers constituting such line must be made parties. A complaint may embrace several carriers, or lines of carriers, operated separately, in the same proceeding, when the subject-matter of the complaint involves substantially the same alleged violation of the law by the several carriers or lines. Persons or carriers not parties may apply, in any pending case or proceeding, for leave to intervene and to be heard upon the questions involved.

GENERAL RULES.

PROCEEDINGS BEFORE THE COURT.

3. All petitions and complaints made before the court for redress of alleged grievances, must plainly and distinctly set forth the grounds of complaint; the items being numbered and objections all set forth in writing. In like manner all defenses must be distinctly set forth in writing, and the items

numbered as above stated. These specifications, whether of complaint or defense, may be accompanied, if the parties desire, by an explanation or argument, or by any suggestion as to the proper remedy or policy, and may be verified by the affidavit of the party complaining or petitioning, taken before any person authorized to administer oaths in North Carolina, and when the complaint or petition is verified, then the answer thereto shall be verified, and the verification shall conform to the rules prescribed in The Code of North Carolina for the verification of pleadings. The parties may also be heard in person or by attorney, or by written argument, upon such written statement being first filed.

4. If a carrier complained against shall deem the complaint insufficient to show a breach of legal duty, it may, instead of filing an answer, serve on the complainant notice for a hearing of the case on the complaint; and in case of the service of such notice, the facts stated in the complaint will be taken as admitted. A copy of the notice must at the same time be filed with the court. The filing of an answer will not be deemed an admission of the sufficiency of the complaint, but a motion to dismiss for insufficiency may be made at the hearing.

SERVICE OF PAPERS.

5. Copies of notices or other papers must be served upon the opposite parties to the proceeding, personally or by mail, and when any party shall have appeared by attorney, the service upon the attorney shall be deemed proper service upon the party. If party so notified shall fail to answer within ten days after such notice, then the court in its discretion may grant the relief demanded.

AMENDMENTS.

6. Upon application by any petitioner or party, amendments may be allowed by the court, in its discretion, to any petition, answer, or other pleading in any proceeding before the Commission.

ADJOURNMENT AND EXTENSION OF TIME.

7. Adjournment and extension of time may be granted upon the application of parties in the discretion of the court.

STIPULATIONS.

8. Parties to cases and proceedings before the court may, by stipulation, duly signed by them and filed with the secretary, agree upon the facts, or any portion of the facts, they deem to be involved in the controversy, which agreed statement shall be regarded and used as evidence. It is desirable that the facts be thus agreed upon whenever practicable.

HEARINGS.

9. Upon issue being joined by the service of answer, the court will assign a time and place for hearing the same, which will be at its office in Raleigh, N. C., at its regular session, unless otherwise ordered. Witnesses will be examined orally before the court, unless testimony be taken or facts agreed upon as otherwise provided in these rules. The petitioner or complainant must in all cases prove the existence of the facts alleged to constitute a violation of the act, unless the carrier complained of shall admit the same, or shall fail to answer the complaint. Facts alleged in the answer must also be proved by the carrier, unless admitted by the petitioner. In cases of failure to answer, the court will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case appear to require.

WITNESSES AND DEPOSITIONS.

10. Subpœnas requiring the attendance of witnesses will be issued by any member of the court in all cases and proceedings before it, and witnesses will be required to obey the subpœnas served upon them requiring their attendance or the production of any books, papers, tariffs, contracts, agreements or documents relating to any matter under investigation or pending before the court. When a subpœna is desired for the production of books, papers or other documentary evidence, special application must be made to the court therefor, specifying the documentary evidence desired. When a cause is at issue on petition and answer, each party may proceed at once to take depositions of witnesses in the man-

ner provided by section 1357 of The Code of North Carolina, and transmit them to the secretary of the commission without making any application to or obtaining any authority from the court for that purpose.

PROPOSED FINDINGS OF FACT.

11. Upon the final submission of a case to the court either party may submit proposed findings of fact for the consideration of the court, which findings must embrace only the material facts of the case supposed to be established by the testimony.

REPORTS.

12. Each railroad company doing business within the State of North Carolina shall file in the office of the court quarterly reports showing in detail statement of freight and passenger earnings, operating expenses, etc., on such forms as may be prescribed from time to time by the court.

Extracts From Constitution of North Carolina.

"The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other."

Article 1, Section 8, Constitution of North Carolina.

Article 2, Section 1, of the Constitution of North Carolina creates a "Legislative Department" and states:

"The legislative authority shall be vested in two distinct branches, both dependent on the people, to-wit: a Senate and House of Representatives."

Article 3 of the Constitution of North Carolina creates an "Executive Department." Section 1 reads:

"The Executive Department shall consist of a Governor, in whom shall be invested the supreme executive power of the State, a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction and an Attorney-General, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly are elected." * * *

Article 4 of the Constitution of North Carolina creates a "Judicial Department." Section 2 reads:

"The judicial power of the State shall be vested in a court for the trial of Impeachment, a Supreme Court, Superior Court, Courts of Justices of the Peace, and such other courts inferior to the Supreme Court as may be established by law."

FILE COPY.

Supreme Court U. S.
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JAMES H. MCKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

(370)

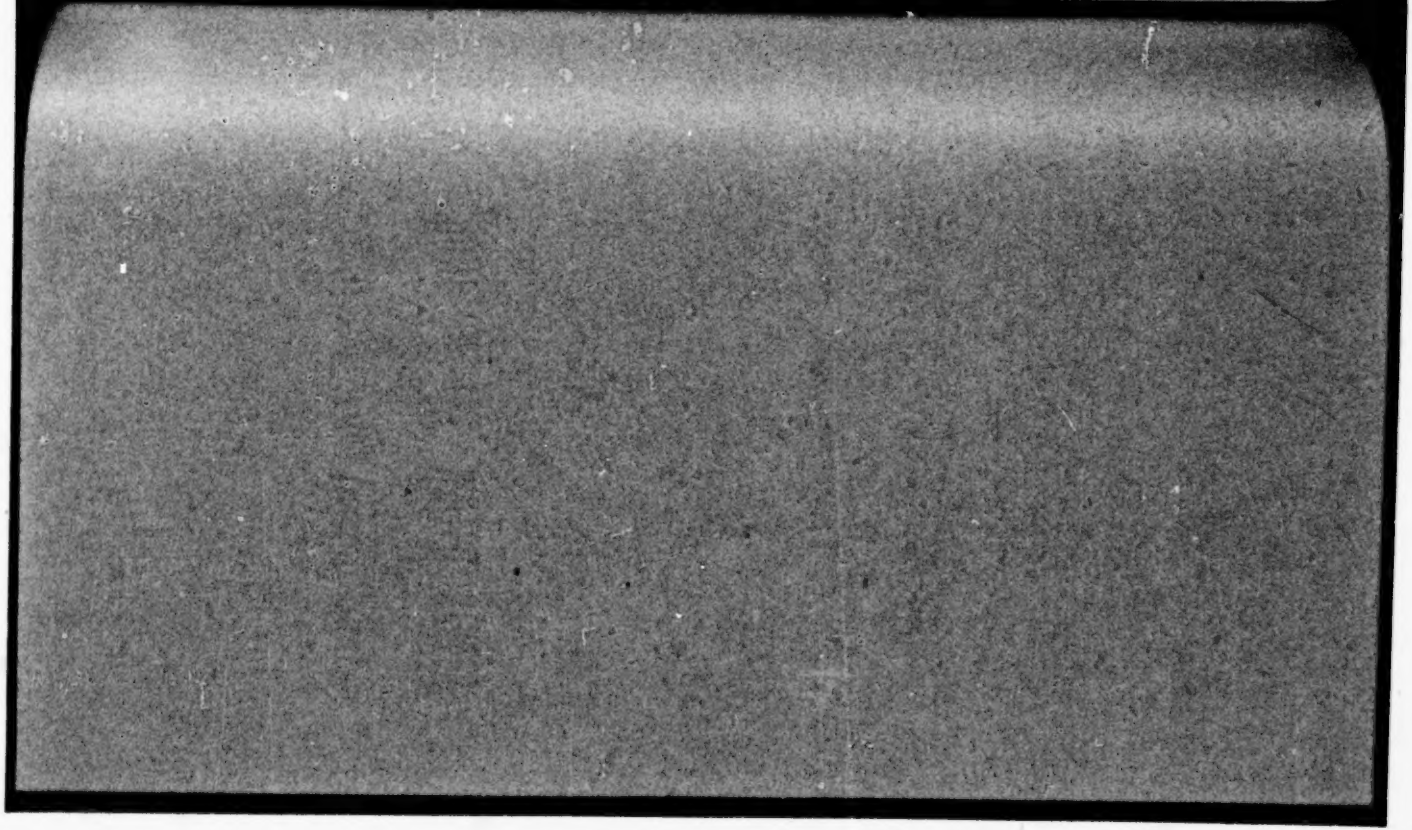
FRANKLIN McNEILL, *et. als.*,
Appellants,

Members of the North Carolina Corporation Commission,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

FABIUS H. BOBBEE,
CLAUDIAN B. NORTHROP,
Solicitors for Southern Railway Company.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

(370)

FRANKLIN McNEILL, *et. als.*,
Appellants,
Members of the North Carolina Corporation Commission.

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

BRIEF OF SOUTHERN RAILWAY COMPANY ON APPELLANTS' MOTION TO ADVANCE.

Southern Railway Company has no preference either for or against the motion to advance the above entitled cause on the docket of the Supreme Court of the United States, and submits itself to be dealt with according to the convenience of this Court.

Without intending to argue either for or against the motion, Southern Railway Company points out that this Court has held that even in a case where revenue laws of a State are enjoined, motion to advance will not be

granted unless it sufficiently appears that the operations of the State will be embarrassed by the delay.

Hoge vs. R. & D. Co., 93 U. S., 1.

Central R. Co. vs. Bourbon County, 116 U. S., 540.

In Carter vs. Greenhow, 109 U. S., 63, it is said:

> "The questions involved may be of public importance, but that does not necessarily entitle the parties to a hearing in preference to others. Practically, every case advanced postpones another that has been on the docket three years awaiting its turn in the regular call."

Inasmuch as the extract from the decree below, set forth at pages 2 and 3, of appellants' printed paper filed herein, entitled, "Motion to Advance," contains a number of typographical errors, the complete decree as it appears in the transcript of record filed in this Court is printed as an appendix to this brief for the convenience and information of this Court.

The complete opinion of the Circuit Court of the United States for the Eastern District of North Carolina, as same appears in 134 F. R., 82, is likewise printed as an appendix to this brief for the convenience and information of this Court.

Respectfully submitted,

FABIUS H. BUSBEE,

CLAUDIAN B. NORTHROP,

Solicitors for Southern Railway Company.

APPENDIX.

Final Decree Filed April 10, 1905.

UNITED STATES OF AMERICA, IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH, FOURTH CIRCUIT.—IN EQUITY.

SOUTHERN RAILWAY COMPANY, *Complainant,*

vs.

GREENSBORO ICE & COAL COMPANY, FRANKLIN MCNEILL, SAMUEL L. ROGERS, AND EUGENE C. BEDDINGFIELD, *Defendants.*

This cause came to be heard on the eighth day of April and by consent adjourned over to April 10th, A. D., 1905, before the Hon. Thomas R. Purnell holding the Circuit Court of the United States for the Eastern District of North Carolina upon the pleadings and proofs on file, and the report of the Standing Master with compainant's exceptions thereto, and stipulations and arguments of counsel.

From the consideration of all of which the Court is of the opinion and doth consider, adjudge and decree as follows:

I

This is a controversy between citizens of different States and is also a controversy arising under the Constitution and laws of the United States.

II

The matter in dispute in this cause, exclusive of interest and costs, exceeds the sum or value of $2,000.

III

Southern Railway Company, the complainant, is a corporation created by and existing under the laws of the State of Virginia and is a citizen and resident of said State.

Greensboro Ice & Coal Company, Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, defendants in this cause, are each and all of them citizens and residents of the State of North Carolina.

IV

The right of the Greenboro Ice and Coal Company, or of any individual shipper or consignee, to have a car transferred and switched upon his private sidings, or spur track, irrespective of the rules and regulations of Southern Railway Company, involves the right of Southern Railway Company to conduct its business, both state and interstate. If all shippers or consignees in North Carolina had the right to have cars switched and placed according to their orders, and irrespective of the rules and regulations of Southern Railway Company, it would entail a loss to Southern Railway Company much in excess of $2,000. The right of Southern Railway Company to conduct and manage its interstate business at Greensboro, N. C., and various stations in the said State amounts in value to many thousands of dollars, far in excess of $2,000.

The right of Southern Railway Company to conduct its interstate business at Greensboro, to dispose of its rolling stock and distribute it, and to refuse or permit its cars to be placed on private sidings, according to its reasonable rules, is of great value to it, and amounts to many thousands of dollars, far in excess of $2,000.

Every day between the hours of twelve noon and one thirty, Southern Railway Company has, arriving at Greensboro, North Carolina, seven mail trains and four trains carrying interstate freight. All of these trains arrive about the same time, and if Southern Railway Company was obliged to place a car on a certain siding at a certain time between these hours under the orders and directions of the private shipper, or under the orders and directions of the North Carolina Corporation Commission, and irrespective of its own reasonable rules and regulations, it would mean detention and delay and damages not only to interstate freight, but to United States mail and passengers. Ordinarily, during other hours, except in cases of unusual congestion, which rarely occurs, cars can be placed on the said spur track and trestle within twenty-four hours of their arrival without interfering with the business of the railroad company, either State or interstate, and it does not inconvenience the railroad company or interfere with its track or business, or place cars on the said spur track and trestle, any more than it would on any other spur track, that is to say, that this can be done in the due course of business and under reasonable rules and regulations of Southern Railway Company.

In the event of congested condition by reason of the number of cars shipped to Greensboro, such condition would be relieved to some extent by using said spur track or siding of the Ice and Coal Company for the purpose of placing the said company's cars on the siding.

The Greensboro Ice and Coal Company does a business which involves a shipment to it of about two hundred cars per year. It pays freight in the neighborhood of $15,000 per year.

The amount of the profit of the Ice and Coal Company does not appear in the evidence, but the business transacted largely exceeds the sum of $2,000, the freight

paid by the company being about $15,000 per year. If the Greensboro Ice and Coal Company had to unload all of its freight on the team tracks other than the siding and trestle in question, the said company could not profitably conduct its business.

The loss to either party by placing the four cars on side track or failure to do so would not and did not amount to two thousand dollars. This is not claimed by the Court material.

The North Carolina Corporation Commission has not, so far as the testimony discloses, attempted to interfere with the business or management of the plaintiff company, except to the extent of requiring it to place the said four cars on the defendant company's siding, nor has the defendant company asked any further interference with said business management. The extent of said interference will more particularly appear by the order made by the North Carolina Corporation Commission.

On October 31, 1903, the North Carolina Corporation Commission, upon complaint of the said Ice and Coal Company, made an order requiring Southern Railway Company within forty-eight hours after service of said order to place four cars of coal consigned to the Greensboro Ice and Coal Company on the private siding or spur track of the Greensboro Ice and Coal Company, at Greensboro, North Carolina.

One of said cars belonged to Southern Railway Company, two were the property of the Norfolk and Western Railway Company and one the property of the Chesapeake and Ohio Railway Company.

On all of said four cars, except the one belonging to it, Southern Railway Company was obliged to pay the railway companies owning the cars a per diem of twenty cents per day for each day such car remained on its line,

after the expiration of the first three days subsequent to the receipt of the car on the rails of Southern Railway Company.

Each foreign car which remains on the rails of another railroad company exceeding thirty days subjects the delinquent road to a penalty of a dollar per day, until the car is returned to the road owning it.

Three of the cars, those not owned by it, were on the rails of Southern Railway Company exceeding three days from the time they were received, and a per diem of twenty cents per car had to be paid by Southern Railway Company. The four cars comprehended by the said order of the North Carolina Corporation Commission were loaded with coal in the States of Pennsylvania, West Virginia and Tennessee, respectively, and each of said cars of coal was transported over lines of Southern Railway Company and connecting lines, as one continuous uninterrupted journey through several different States to Greensboro, North Carolina.

At the time said order of said North Carolina Corporation Commission was made, and both prior and subsequent thereto, the said coal remained loaded on the cars in the original unbroken package in which it began its continuous uninterrupted journey respectively, from the States of Tennessee, West Virginia and Pennsylvania, and said coal and said cars were still in the possession of Southern Railway Company undelivered to consignee.

Said four cars loaded with coal as aforesaid and transported as above mentioned were and are interstate commerce.

Southern Railway Company declined to switch these cars upon the private siding or trestle of the Ice and Coal Company because the latter had refused to comply with the rules of the North Carolina Car Service Asso-

ciation adopted by Southern Railway Company to expedite the use of equipment in the public interest.

The general rules adopted by Southern Railway Company, known as rules of the North Carolina Car Service Association, are reasonable, and their object is not to produce revenue, but to facilitate the distribution of equipment and the expeditious handling of freight, and to that end to enforce an equal, reasonable and uniform charge for the detention of cars, when the cars were detained over the free time prescribed in the rules. They have had this effect, and have operated and do operate to the mutual benefit of the railroads and the public and have reduced the average time of detention of cars from five to one and one-fifth days and have increased the number of cars available for public service, thereby releasing cars for other use in commerce to the advantage of the general commerce of the country and the public.

The terms and provisions of these rules of the North Carolina Car Service Association adopted by Southern Railway Company were well known to the Greensboro Ice and Coal Company, one of the defendants in this cause, which company has done business under them for some years.

Among the provisions of the said rules were and are the following:

> "Section 1, of Rule 2. On commodities for unloading or loading forty-eight hours, two days free time will be allowed, except that Sec. 2, seventy-two hours will be allowed for unloading fertilizer, and the following commodities when in bulk only: Cotton seed, cotton seed hulls, coal, coke, fertilizing material, grain, lime, tan-bark, and dressed lumber in box cars.
>
> "Sec. 2, of Rule 2. In case consignees or consignors refuse to pay, or unnecessarily defer settle-

ment of bills for car service charges, the railroads shall, upon notice to that effect from the manager, refuse to switch any cars for such consignees or consignors until such charges are paid."

Southern Railway Company, on October 12, 1903, issued a notice to Greensboro Ice and Coal Company that, commencing at 12 noon, October 17, 1903, it would only deliver cars on the public team tracks of Southern Railway Company at Greensboro, North Carolina.

Said four cars of coal came on the yards of Southern Railway Company at Greensboro, North Carolina, after October 17, 1903. Proper notices were sent the said Greensboro Ice and Coal Company of their arrival, and the cars were marked up to the public team tracks of Southern Railway Company at Greensboro and actually placed thereon, and the delivery tendered to the Ice and Coal Company. The said Ice and Coal Company declined to receive or unload said cars at any other point whatsoever except on their private siding or trestle.

The refusal to unload said cars was not because of any defect in the notices, but because the Greensboro Ice and Coal Company required and demanded that the said cars should be placed on their private track or trestle. Said four cars of coal reached Greensboro, North Carolina, between October 18th and October 22d, 1903, and were placed on the public team tracks and there remained for the purpose of being unloaded by the Greensboro Ice and Coal Company until November 2, 1903, when they were removed because they were blocking the team tracks and interfering with the public use thereof.

According to the rules of the North Carolina Car Service Association adopted by Southern Railway Company, seventy-two free hours time is allowed for unloading coal in bulk, and these cars remained on the team

tracks at Greensboro, North Carolina, much more than seventy-two hours from the time that they arrived (October 18th to 22d, 1903) and the 31st of October, 1903, the date of the Commission's order, and, therefore, when such order was passed, demurrage was actually due on these four cars. No demurrage has been paid by the Greensboro Ice and Coal Company. The said Greensboro Ice and Coal Company had first refused to pay freight on these four cars of coal unless the same were placed on their private siding.

On October 27, 1903, upon receipt of a letter of the North Carolina Corporation Commission, dated October 26, 1903, advising Greensboro Ice and Coal Company to pay the freight, and on account of said letter Greensboro Ice and Coal Company paid the freight on the said four cars of coal.

Said four cars having reached Greensboro between October 18 and 22, 1903, and seventy-two hours free time having expired long prior to October 27, 1903, demurrage was due on said cars on October 27, 1903, the day the freight was paid.

The notice of October 12, 1903, declining to switch cars to the private siding of the Greensboro Ice and Coal Company, and the refusal to deliver the four cars in question, was based upon the refusal of the Greensboro Ice and Coal Company to "comply with car service regulations of Southern Railway Company."

The Ice and Coal Company was solvent and so known to Southern Railway Company.

When the four cars of coal arrived the work on the siding and trestle had been completed and they were in good condition for delivery and unloading coal and were so known to the agents of Southern Railway Company who had control of placing cars.

At that time Southern Railway Company could have

switched said cars on the siding within twenty-four hours after their arrival and the Greensboro Ice and Coal Company could have unloaded the coal and left the cars to the control of the railway company within three hours after they were so switched, respectively.

It would in no way have interfered with the prompt, economical and easy handling of this or other freight or business for Southern Railway Company to have placed the four cars as requested.

The trestle can, in the ordinary course of business, be used by Southern Railway Company for unloading freight consigned to Greensboro Ice and Coal Company with ease, and such freight can be unloaded there in less time than would be required in unloading it elsewhere. It is easier to unload coal from the trestle of the Greensboro Ice and Coal Company than from the public team tracks. The last three paragraphs are not deemed material, but are found at the request of the defendant.

About 1890 the Greensboro Ice and Coal Company leased the property upon which its plant is situated, and which embraces the yard of one W. D. McAdoo, who owned and now owns the same. The lease was renewed in 1899, and is still existing.

At the time of the first lease the Cape Fear and Yadkin Valley Railroad Company had a short spur track extending from its main track to within three or four feet of the yard of the Greensboro Ice and Coal Company. It could accommodate only one car so as to be conveniently unloaded.

In the spring of 1891, or some time thereafter, the said track was extended within the yard of the Greensboro Ice and Coal Company, so that in 1895 it had reached a point very near the boilers of said company.

The extension was made by the Cape Fear and Yadkin Valley Railroad Company at its own expense and

upon oral agreement, at the instance of the Greensboro Ice and Coal Company, and for its accommodation. The terms of the agreement do not appear.

In 1895 it was further extended by the Greensboro Ice and Coal Company. This was all done before the renewal of the lease of McAdoo and the purchase of the Cape Fear and Yadkin Valley Railroad Company by Southern Railway Company.

Since the extension of said track into the yard of the Greensboro Ice and Coal Company, the Cape Fear and Yadkin Valley Railroad Company, and its successor, Southern Railway Company, have been delivering cars over said track to the yard of the Greensboro Ice and Coal Company.

That part of the spur track outside of the yard of the Greensboro Ice and Coal Company had also been used by Southern Railway Company for the purpose of shifting their cars, for holding dead cars, and in some instances, unloading for persons near the track. There has been no objection to such use of said track by the Greensboro Ice and Coal Company.

The extension from the railway's right of way to the yard of the Greensboro Ice and Coal Company passes over land belonging to W. D. McAdoo and the Guilford Rolling Mills, and neither Southern Railway nor Greensboro Ice and Coal Company have any legal right to use the same, there being no written grant of easement or license, the Greensboro Ice and Coal Company having only the right, under its lease from McAdoo, to ingress and egress for ordinary vehicles.

The use of said land has been by sufferance of the owners, and the said owners have made no objection and taken no steps to prevent such use, and such use has been, and now is permitted, though once or twice the secretary of the said mills has complained of it as a

nuisance, and McAdoo has threatened to have compensation made him.

The Greensboro Ice and Coal Company desired to construct a trestle within its yard for the more convenient unloading of cars, and this involved the raising of the existing track and the moving of it, or a part of it, a short distance, 10 or 12 feet south.

There was a grade of several feet from where, or near where, the track left the railway right of way to the proposed trestle so that the track was not only to be elevated within the yard, but also outside of it, the proposed removal still leaving the track to pass over the land of other parties above named. Application to make these changes was made to Southern Railway Company about the first of September, 1903. The permission was granted, the agreement being that the Greensboro Ice and Coal Company should do the entire work at its own expense, including the grading, etc., except the removal and laying of the track, which Southern Railway Company agreed to do, or supervise, when the work was ready, using its own iron (the same which was already there) and its spikes, etc. Plans were exhibited and agreed to, and the work commenced about the 8th or 9th of September, 1903, and was completed about the 29th or 30th of September, 1903.

There was no written or expressed contract on the part of Southern Railway Company in respect to the use of the said track or siding, but considering all the circumstances, there was an implied agreement that said track should be adopted and treated, so far as the Greensboro Ice and Coal Company was concerned, as a track for the delivery of its cars upon its trestle, under the reasonable rules and regulations of Southern Railway Company, this implied agreement to continue as long as the side track was maintained by mutual con-

sent and to be terminated at the will and option of said Southern Railway Company or Greensboro Ice and Coal Company.

It is admitted, and is a fact, that during the period between the commencement and completion of the work no cars could be received or unloaded within the yard of the Greensboro Ice and Coal Company.

It is the custom of Southern Railway Company to construct private sidings for the use of shippers of large quantities of freight, but it is not the policy of said railway company to do so except under contract, the printed form of which is in evidence, said contract containing provisions securing the acquisition of the necessary rights of way, and for the termination of the contract in pursuance of stipulations therein contained, etc.

There was a standing order on the part of the Greensboro Ice and Coal Company that its cars should be delivered upon its yard. There was no contract to deliver cars on the track outside the yard.

That the Greensboro Ice and Coal Company did not have the exclusive right or priority to have cars placed and unloaded on said spur track.

The track had been spiked down by the railway company on the 14th of September, as unsafe for their equipment, etc. After this date the preponderance of testimony establishes that no other cars were put upon said track until the completion of the work on the 29th of September, certainly it was not generally used for the purpose of delivery and unloading.

The work commenced by excavating inside the yard of the Greensboro Ice and Coal Company near the fence, and the rails were torn up inside and also several feet outside of the fence.

After a week or more the building of an embankment or "fill' was commenced outside of the said yard, and

some feet south of the existing track, preparatory to a removal of the rails on it, to a greater elevation, the dirt being taken from the excavation inside the yard.

On the 14th of September, 1903, the end of the track within several feet of the fence had been "jacked up," leaving the sills hanging. There was testimony tending to show that about or after the 14th of September, 1903, the "jacking up" or removal of the dirt from under the rails extended some distance along the spur track, making it dangerous to place cars upon it. There was a fall of some feet towards the yard, necessitating the use of brakes, or "choking," the new track, when completed, being a renewal of this grade some distance in order to meet the necessary elevation of the trestle. The work was being done by the Greensboro Ice and Coal Company, under its supervision and control, by its contractors, Southern Railway Company having nothing to do with it except to shift the rails to the new track when all was ready.

There was sufficient space on the track which had not been removed to accommodate two cars from where the track was first torn up several feet from the yard of the Greensboro Ice and Coal Company, and it was possible up to within two or three days of the completion of the work for Southern Railway Company to have placed and unloaded cars upon it.

In not using said track for delivery and unloading of cars within that period, that is, from the 14th of September, 1903, to within two or three days of its completion, about the 29th or 30th of September, 1903, Southern Railway Company exercised a reasonable degree of prudence in respect to the safety of the public, its equipment and the orderly conduct of its business.

There were and are team tracks of Southern Railway Company at Greensboro on which these four cars were

placed, where the unloading of the coal would have been feasible (and the Greensboro Gas Company and many others habitually unload coal from them), though not as convenient and inexpensive as said spur track, or private siding of the Greensboro Ice and Coal Company. The unloading on the team tracks would render the business of the Greensboro Ice and Coal Company unprofitable.

There were and are several coal bins and chutes on the public tracks, but these could not always be relied upon, owing to the demands of other shippers. The bins were filled at the time covered by this controversy. The notices of the arrival of all of said cars did not contain the weight or amount of charges.

The North Carolina Corporation Commission threatened to institute suits against Southern Railway Company for heavy penalties and damages on account of any failure to obey said order.

There does not appear to be any substantial conflict of testimony as to the nature of the proceedings had before the North Carolina Corporation Commission. It appears that about the 20th of October, 1903, a letter from M. W. Thompson, on behalf of the Greensboro Ice and Coal Company, addressed to the said Commission, was received by them. It was in the form of a letter, and the formal requirements of the rules of practice of the said Commission as to sections, the numbering of the same, etc., were not observed.

The Commission treated the letter as a complaint but did not serve any formal notice upon Southern Railway Company or its agents.

On the 26th of October, 1903, the Commission "phoned" the manager of the Car Service Association to come to its office. The answer was that he was not in

the city, and the Commission then requested that he come to the office of the Commission on his return.

Some days after, the First Vice-President of Southern Railway Company visited the office of the Commission upon other business, and after this was concluded, this matter (the subject of Mr. Thompson's letter) was mentioned to him.

On the return of the manager of the Car Service Association he went to the office of the Commission. The letter of Mr. Thompson was read, or its contents made known to him, and the matter was discussed.

The proceedings before the Corporation Commission were not in conformity with the rules of practice of the Commission, and the Commission did not follow them strictly except in formal matters.

No witnesses were sworn in this matter, nor any issue joined by a pleading, nor any other hearing except in a conversational way, first with one and then another representative of the different corporations.

On November 3, 1903, exceptions were filed to the order of the Corporation Commission. The hearing of these exceptions was had on November 12, 1903, at Greensboro, North Carolina, when witnesses were examined and arguments made by counsel.

On December 10, 1903, the Commission made an order overruling the exceptions.

V.

It is further considered, ordered, adjudged and decreed that the fifth exception of complainant to the Master's report be and the same hereby is sustained, and that Southern Railway Company declined to switch, place and deliver said four cars of coal upon the private siding or spur track of the Greensboro Ice and Coal

Company, because the Greensboro Ice and Coal Company had refused to abide by and comply with the reasonable rules and regulations of Southern Railway Company, known as the rules of the North Carolina Car Service Association, and especially Section 2, of Rule 2, hereinbefore fully set out in this decree, which rules and regulations were adopted by Southern Railway Company, not for the purpose of revenue, but to facilitate and expedite the handling of freight and the use and distribution of equipment alike for the benefit of the public and Southern Railway Company, the observance of which rules and regulations are essential for the management of the business of Southern Railway Company and for the welfare of the public.

VI.

It is further considered, ordered, adjudged and decreed that complainant's twelfth exception to the findings of the master be and the same is hereby sustained, and that all testimony and findings of the master with reference to the 13 cars of coal which arrived at Greensboro, North Carolina, between the 9th and 19th of September, 1903, be and are hereby expunged and ruled out as irrelevant. It is further adjudged and decreed that to have switched the 13 cars on the siding would have been dangerous to the public and the equipment of the railroad company.

VII.

It is further considered, ordered, adjudged and decreed that the right of Southern Railway Company to conduct its interstate business at Greensboro, North Carolina, and elsewhere throughout the State of North Carolina under its reasonable rules and regulations is

involved in this suit and that unless it is protected in this right it will suffer irreparable injury which could not be compensated in damages.

It is further considered, ordered, adjudged and decreed that unless defendants herein are restrained and enjoined they will bring a multiplicity of suits against Southern Railway Company for the recovery of penalties and damages growing out of its disobedience of the void orders of the defendants McNeill, Rogers and Beddingfield, dated October 31, 1903, and December 10, 1903, and growing out of alleged violations by Southern Railway Company of the provisions of Chapter 164, Public Laws of North Carolina, 1899, and amendments therto.

It is further considered, ordered, adjudged and decreed that Southern Railway Company has a common defense to all of said threatened suits involving a question of law common to all of said suits and that said orders of said McNeill, Rogers and Beddingfield, dated October 31, 1903, and December 10, 1903, are void and repugnant to the Constitution and Laws of the United States and constitute a direct interference with interstate commerce.

It is further considered, ordered, adjudged and decreed that the rules of the North Carolina Corporation Commission promulgated in pursuance of Sub-section 26, of Section 2, of Chapter 164, Public Laws of North Carolina, 1899, and amendments thereto purporting to authorize North Carolina Corporation Commission

> "to make rules governing railroads in the placing of cars for loading and unloading and in fixing time limit for the delivery of freights after the same have been received by the transportation companies for shipment"

are void in so far as said rules and regulations purport to govern and control interstate commerce, and it is further considered, adjudged, ordered and decreed that said rules are wholly inapplicable to interstate commerce.

VIII

It is further considered, ordered, adjudged and decreed that the Greensboro Ice and Coal Company, its officers, agents, attorneys, employees and all persons whomsoever, be and are hereby perpetually enjoined and restrained from instituting or authorizing or directing any others to institute any suit or suits, action or actions, against Southern Railway Company or any of its officers, agents, or employees founded and based upon its disobedience of the orders of the North Carolina Corporation Commission, dated October 31, 1903, and December 10, 1903, or for the recovery of any penalties or damages under and by virtue of any provisions of the Act of the General Assembly of North Carolina, Public Laws, 1899, Chapter 164, and any and all amendments thereto, and under any other law and under and by virtue of any orders, rules or regulations of said defendants, Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, acting as North Carolina Corporation Commission or any of them combined or their successors in office in so far as same relate to or purport to affect said four cars of coal or any other interstate commerce of Southern Railway Company in North Carolina.

IX.

It is further considered, ordered, adjudged and decreed that said defendants, Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, and each and all of

them and any of them combined, and their successors in office, as members of said North Carolina Corporation Commission are hereby perpetually enjoined and restrained from instituting or authorizing or directing any others to institute any suit or suits, action or actions, against Southern Railway Company or any of its officers, agents and employees founded and based upon the disobedience by Southern Railway Company of said orders of said McNeill, Rogers, and Beddingfield, dated October 31, 1903, and December 10, 1903, and they and their successors in office are each and all and any of them combined hereby perpetually enjoined and restrained from requiring, authorizing, permitting, requesting or inducing the Attorney-General of North Carolina or his successors in office to institute or bring any suit or suits on relation of North Carolina Corporatin Commission for the recovery of any damages or penalties from Southern Railway Company by virtue of any provisions of the Act of the General Assembly of North Carolina, Public Laws, 1899, Chapter 164, or any amendments to said Act and each and all of them and any of them combined and their successors in office are hereby perpetually enjoined and restrained from attempting to apply the provisions of any rules, orders or regulations of the North Carolina Corporation Commission relating to the placing of cars for loading and unloading and fixing of a time limit for delivery of freight after same may have been received by the transportation companies for shipment or any other rules or regulations of said North Carolina Corporation Commission to any equipment or any of the operations or transactions of Southern Railway Company while same are engaged in interstate commerce. And said defendants, McNeill, Rogers, and Beddingfield, and their successors in office are hereby perpetually enjoined and restrained

from in anywise interfering with any of the interstate commerce whatsoever of Southern Railway Company, or the receiving, delivering, storage or handling thereof.

X

It is further considered, ordered, adjudged and decreed that upon discovery of any person or persons at present unknown to Southern Railway Company who threaten to bring suits against Southern Railway Company for the recovery of penalties or damages for the breach of any orders, rules or regulations of said North Carolina Corporation Commission, directly interfering with interstate commerce of Southern Railway Company, that Southern Railway Company is hereby granted leave to file a petition in this cause and have said persons made parties to this suit and their names inserted and included in the injunction issued herein.

XI

It is further considered, ordered, adjudged and decreed that a Writ of Injunction issue from this Court perpetually enjoining defendants as aforesaid.

XII

It is further considered, ordered, adjudged and decreed that Southern Railway Company recover of the Greensboro Ice and Coal Company, Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield $629.75, costs of this cause, including an allowance of three hundred and fifty dollars to the Special Master for which execution will issue.

(Signed) THOS. R. PURNELL,
U. S. Judge, etc.

April 10, 1905.

SOUTHERN RY. CO.

v.

GREENSBORO ICE & COAL CO., ET AL.

(Circuit Court, E. D. North Carolina, December 16, 1904.)

1. INTERSTATE COMMERCE—REGULATION—RESTRICTION ON POWERS OF STATES.

Car loads of coal shipped from one State into another remain subjects of interstate commerce until delivery of to the consignee, and an order of a State corporation commission directing the railroad company to place the cars on a certain track for unloading, as requested by the consignee, is without jurisdiction, and void, as an interference with interstate commerce.

2. JURISDICTION OF FEDERAL COURT—SUIT AGAINST STATE COMMISSION.

A suit against a State corporation commission to enjoin the enforcement of an order alleged to be void as an interference with interstate commerce in violation of the Federal Constitution and laws is not one against the State, and is within the jurisdiction of a Federal court.

3. SAME—ENJOINING STATE BOARD.

The North Carolina Corporation Commission, although made by the statute a court of record, is, in the exercise of many of the powers vested in it, merely an agent of the State, and may be enjoined by a Federal court as to acts which are not judicial in character.

In Equity. Suit for injunction.

W. A. Henderson, C. B. Northrop, and F. H. Busbee, for complainant.

R. D. Gilmer, Attorney General, and R. H. Battle, for North Carolina Corporation Commission.

E. J. Justice, for Greensboro Ice & Coal Co.

PURNELL, District Judge. This is a bill in equity to enjoin the defendants from bringing suits for penalties and damages by reason of the refusal of the complainant to place upon the trestle of the defendant ice and coal company four certain cars, and a failure to comply with the order of the defendant commissioners of the North Carolina Corporation Commission to so place the said cars. The bill coming on to be heard, after argument by counsel, a restraining order was entered, and the same referred to the standing master to find the facts. The following, omitting what is deemed unnecessary, are, in substance, the facts as found by the master:

The Southern Railway is a corporation created by and existing under the laws of the State of Virginia, and is a citizen and resident of the said State. All the defendants are citizens and residents of the State of North Carolina. The right of the Greensboro Ice & Coal Co., or of an individual shipper or consignee, to have cars transferred and switched upon his private sidings or spur track, irrespective of the rules and regulations of the Southern Railway Company, involves the right of the Southern Railway Company to conduct its business, both State and interstate. If all shippers or consignees in North Carolina had the right to have cars switched and placed according to their orders, and irrespective of the rules and regulations of the Southern Railway Company, it would entail a loss to the Southern Railway Co. much in excess of $2,000. The right of the Southern Railway Co. to conduct and manage its interstate business at Greensboro, N. C., and various stations in the said State, amounts in value to many thousands of dollars far in excess of $2,000. The right of the Southern Railway Co. to conduct its interstate business at Greensboro, to dispose of its rolling stock and distribute it, and to refuse to permit its cars to be placed on private sid-

ings, according to its reasonable rules, is of great value to them, and amounts to many thousands of dollars, far in excess of $2,000. Every day, between the hours of 12 noon and 1:30, the Southern Railway Co. has arriving at Greensboro, N. C., seven mail trains and four trains carrying interstate freight. All of these trains arrive about the same time, and if the Southern Railway was obliged to get a car out of one of these trains, or was obliged to place a car on a certain siding at a certain time between these hours, under the orders and directions of the private shipper, or under the orders and directions of the North Carolina Corporation Commission, and irrespective of its own reasonable rules and regulations, it would mean detention and delay and damages, not only to interstate freight, but the United States mail and passengers. Ordinarily, during other hours, except in cases of unusual congestion, which rarely occurs, cars can be placed on the said spur track and trestle within 24 hours of their arrival, without interfering with the business of railroad company, either State or interstate; and it does not inconvenience the railroad, or interfere with its track or business, to place cars on the said spur track and trestle, any more than it would on any other spur track; that is to say, that this can be done in due course of business and under reasonable rules and regulations of the company. In the event of congested condition by reason of the number of flat cars shipped to Greensboro, such condition would be relieved to some extent by using the said spur track or siding of the ice and coal company for the purpose of placing the said company's cars on the siding. The Greensboro Ice & Coal Co. does a business which involves a shipment to it of about 200 cars per year, according to the testimony. It pays freight in the neighborhood of $15,000 per year. The amount of the profits of the ice and coal company

does not appear in evidence, but the business transacted largely exceeds the sum of $2,000, the freight paid by the company being about $15,000 per year. If the ice and coal company had to unload all of its freight on the team tracks other than the siding and trestle in question, the said company could not profitably conduct its business. The amount of loss or inconvenience to either party by actually placing the four cars in question upon the side or spur track or by failure to place the same would not and did not amount to $2,000.

The North Carolina Corporation Commission has not, so far as the testimony discloses, attempted to interfere with the business or management of the plaintiff company, except to the extent of requiring it to place the said four cars on the defendant company's siding, nor has the defendant company asked any further interference with said business management. The extent of said interference will more particularly appear by the order made by the North Carolina Corporation Commission. On October 31, 1903, the North Carolina Corporation Commission, upon complain of the said ice and coal company, made an order requiring the Southern Railway, within 48 hours after service of said order, to place four cars of coal consigned to the Greensboro Ice & Coal Co. on the private siding or spur track of the Greensboro Ice & Coal Co. at Greensboro, N. C. One of said cars belonged to the Southern Railway Company; two were the property of the Norfolk & Western Railway Company, and one the property of the Chesapeake & Ohio Railway Company. On all of said four cars, except the one belonging to it, the Southern Railway Company was obliged to pay the railway companies owning the cars a per diem of 20 cents per day for each day such car remained on its line after the expiration of the first three days subsequent to the receipt of the car

on the rails of the Southern Railway Company. Each foreign car which remains on the rails of another railroad company exceeding 30 days subjects the delinquent road to a penalty of a dollar per day until the car is returned to the road owning it. Three of the cars—those not owned by it—were on the rails of the Southern Railway Company exceeding three days from the time they were received, and a per diem of 20 cents per car had to be paid by the Southern Railway Company. The four cars comprehended by the said order of the North Carolina Corporation Commission were loaded with coal in the States of Pennsylvania, West Virginia, and Tennessee, respectively, and each of said cars of coal was transported over lines of the Southern Railway Company and connecting lines as one continuous, uninterrupted journey through several different States to Greensboro, N. C. At the time said order of said North Carolina Corporation Commission was made, and both prior and subsequent thereto, the said coal remained loaded on the cars in the original unbroken package in which it began its continuous, uninterrupted journey from the States of Tennessee, West Virginia, and Pennsylvania, and said coal and said cars were still in the possession of the Southern Railway Company, undelivered to consignee.

It is admitted in the answer, and also upon the taking of testimony, that said four cars loaded with coal as aforesaid, and transported as above mentioned, were and are interstate commerce.

The Southern Railway Comany declined to switch these cars upon the private siding or trestle of the ice and coal company because it was claimed the latter company had refused to comply with the rules of the North Carolina Car Service Association, adopted by the Southern Railway Company to expedite the use of equipment

in the public interest. The general rules adopted by the Southern Railway Company, known as "Rules of the North Carolina Car Service Association," are reasonable, and their object is, not to produce revenue, but to facilitate the distribution of equipment and the expeditious handling of freight, and to that end to enforce an equal, reasonable, and uniform charge for the detention of cars when the cars are detained over the free time prescribed in the rules. They have had this effect, and have operated, and do operate, to the mutual benefit of the railroads and the public, and have reduced the average time of detention of cars from five days to one and one-fifth days, and have increased the number of cars available for public service. The terms and provisions of these rules of the North Carolina Car Service Association, adopted by the Southern Railway Company, were well known to the ice and coal company, which has done business under them for some years. Among the provisions of said rules were the following:

> "Sec. 1 of Rule 2. On commodities for unloading or loading forty-eight hours, two days' free time will be allowed, except that Sec. 2, seventy-two hours will be allowed for unloading fertilizer and the following commodities, when in bulk only: Cotton seed, cotton seed hulls, coal, coke, fertilizing material, grain, lime, tan bark, and dressed lumber in box cars.
>
> "Sec. 2 of Rule 2. In case consignees or consignors refuse to pay, or unnecessarily defer settlement of bills for car service charges, the railroads shall, upon notice to that effect from the manager, refuse to switch any cars to such consignees or consignors until such charges are paid."

The Southern Railway Company on October 12, 1903, issued a notice to the ice and coal company that, com-

mencing at 12 noon, October 17, 1903, it would only deliver cars on the public team tracks of the Southern Railway Company at Greensboro, N. C. After October 12, 1903, and subsequent to receiving said notice, the ice and coal company ordered said four cars of coal, and caused them to start from their respective points of origin, and could have countermanded said order. Said four cars of coal came on the yards of the Southern Railway Company at Greensboro, N. C., after October 17, 1903. Proper notices were sent the said ice and coal company of their arrival, and the cars were marked up to the public team tracks of the Southern Railway Company at Greensboro, and actually placed thereon, and the delivery tendered to the ice and coal company. The ice and coal company declined to receive or unload said cars at any other point whatsoever, except on their private siding or trestle. The refusal to unload said cars was not because of any defect in the notices, but because the ice and coal company required and demanded that the said cars should be placed on their private track or trestle. Said four cars of coal reached Greensboro, N. C., between October 18 and October 22, 1903, and were placed on the public team tracks, and there remained for the purpose of being unloaded by the ice and coal company until November 2, 1903, when they were removed because they were blocking the team tracks and interfering with the public use thereof.

According to the rules of the North Carolina Car Service Association, adopted by the Southern Railway Company, seventy-two free hours' time is allowed for unloading cars; and these cars remained on the team tracks much more than seventy-two hours from the time they arrived (October 18 to 22, 1903) and the 31st of October, the date of the Commission's order, and, therefore, when such order was passed, demurrage was act-

ually due upon these four cars, "provided that the Court shall hold upon the facts that it was not the duty of the Southern Railway Company to place the said cars upon the said side track or trestle of the said ice and coal company, as it was requested to do." No demurrage had been paid by the ice and coal company. The said ice and coal company had first refused to pay freight on these four cars of coal unless the same were placed on their private siding. On October 27, 1903, upon receipt of the letter of the North Carolina Corporation Commission, dated October 26, 1903, and on account of said letter, the ice and coal company paid the freight on the four carloads of coal. Said four cars having reached Greensboro between October 18 and 22, 1903, and seventy-two hours' free time having expired long prior to October 27, 1903, demurrage was due on said cars on October 27, 1903, the date the freight was paid, "provided the Court shall hold upon the facts that it was not the duty of the Southern Railway Company to place the said cars upon the siding or trestle of the ice and coal company, as it was requested to do." The notice of October 12, 1903, declining to switch cars to the private siding of the ice and coal company, and the refusal to deliver the four cars in question was alleged to have been based upon the refusal of the ice and coal company to "comply with car service regulations," etc. The alleged refusal to comply with the said rules consisted in the refusal of the ice and coal company to pay an account for demurrage of some $146 claimed to be due on certain 13 cars previously delivered. This claim was denied on the part of the ice and coal company. The ice and coal company was solvent, and was so known to the Southern Railway Company, when the four cars arrived, the work upon the siding and trestle had been completed, and they were in good condition for delivery and for unload-

ing of coal, and were so known to the agents of the railway company which had control of placing cars. At that time the Southern Railway could have switched said cars on the siding within 24 hours after their arrival, and the ice and coal company could have unloaded the coal, and left them to the control of the railway company, within three hours after they were so switched, respectively. It would in no way have interfered with the prompt, economical, and easy handling of this or other freight or business for the Southern Railway to have placed the four cars as requested. The trestle can, in the ordinary course of business, be used by the Southern Railway Company for unloading freight consigned to the ice and coal company with ease, and such freight can be unloaded there in less time than would be required in unloading it elsewhere. It is easier to unload coal from the trestle of the ice and coal company than from the public team tracks.

About 1890 the ice and coal company leased the property upon which its plant is situated, and which embraces its yard, of one W. D. McAdoo, who owned and now owns the same. The lease was renewed in 1899, and is still existing. At the time of the first lease the Cape Fear and Yadkin Railroad Company had a short spur track extending from its main track to within three or four feet of the yard of said ice and coal company. It could accommodate only one car so as to be conveniently unloaded. In the spring of 1891, or some time thereafter, the said track was extended within the yard of the ice and coal company, so that in 1895 it had reached a point very near the boilers of said company. The extension was made by the Cape Fear & Yadkin Valley Railroad Company at its own expense, and upon oral agreement, at the instance of the said ice and coal company and for its accommodation. The terms of this

agreement do not appear. In 1895 it was further extended by the ice and coal company. This was all done before the renewal of the lease of McAdoo and the purchase of the Cape Fear & Yadkin Valley Railroad by the Southern Railway Company. Since the extension of said track into the yard of the ice and coal company the Cape Fear & Yadkin Valley Railroad Company and its successor, the Southern Railway Company, have been delivering cars over said track to the yard of the ice and coal company. That part of the spur track outside of the yard of the ice and coal company had also been used by the railway company for the purpose of shifting their cars, for holding dead cars, and, in come instances, unloading for persons near the said track. There has been no objection to such use of said track by the ice and coal company. The extension from the railway's right of way to the yard of the ice and coal company passes over land belonging to W. D. McAdoo and the Guilford Rolling Mills, and neither the Southern Railway Company nor the ice and coal company have any legal right to use the same, there being no written grant of easement or license, the ice and coal company having only a right, under its lease from McAdoo, to ingress and egress for ordinary vehicles. The use of said land has been by sufferance of the owners, and the said owners have made no objection and taken no steps to prevent such use, and such use has been and now is permitted, though once or twice the secretary of the said mills has complained of it as a nuisance, and McAdoo has threatened to have compensation made him. The ice and coal company desired to construct a trestle within its yards for the more convenient unloading of cars, and this involves the raising of the existing track and the moving of it, or a part of it, a short distance—10 to 12 feet—south. There was a grade of several feet from where, or near

where, the track left the railway right of way, to the proposed trestle, so that the track was not only to be elevated within the yard, but also out of it, the proposed removal still leaving the track to pass over the land of other parties, above named. Application to make these changes was made to the Southern Railway Company about the 1st of September, 1903. The permission was granted, the agreement being that the ice and coal company should do the entire work at its own expense, including the grading, etc., except the removal and laying of the track, which the Southern Railway Company agreed to do or supervise, when the work was ready, using their own iron (the same which was already there) and its spikes, etc. Plans were exhibited and agreed to, and the work commenced about the 8th or 9th of September, 1903, and completed about the 29th or 30th of September, 1903. There was no written or expressed contract on the part of the Southern Railway Company in respect to the use of the said track, but, considering all the circumstances, induces the master to find "that there was an implied agreement that said track should be adopted and treated, so far as the ice and coal company was concerned, as a track for the delivery of its cars upon its trestle, under the reasonable rules and regulations of the said Southern Railway Company, this implied agreement to continue so long as the said track was maintained by mutual consent." It is admitted that during the period between the commencement and the completion of the work no cars could be received or unloaded within the yard of the ice and coal company. It is the custom of the Southern Railway Company to construct private sidings for the use of shippers of large quantities of freight, but it is not the policy of the said railway, except under contract, the printed form of which is in evidence, such contract containing a provision securing

the acquisition and necessary rights of way, etc. There was a standing order on the part of the ice and coal company that its cars should be delivered upon its yard. There appears to have been no such standing order in respect to the delivery of cars on the spur track outside of said yards, except the request in respect to 13 cars arriving after the beginning and before the completion of said work. There was no contract to deliver cars on the track outside of the yard. This standing order was given to the agent after the track had been torn up in the yard, and about the time of the beginning of the construction of the trestle. In respect to the said 13 cars it is claimed by the ice and coal company that it designated this spur track outside of the yard as a proper and accessible point of delivery, and that the complainant, failing to comply, could not claim demurrage because of the failure or refusal of the said ice and coal company to receive them at any other point. From the 9th to the 14th of September the said spur track was occupied by the Woodruff & Townsend cars—one of them from the 9th to the 11th, and the other from the 12th to the 14th. The ice and coal company did not have the exclusive right or priority to have cars placed and unloaded on said spur track. One of the thirteen cars arrived on September 9, 1903, and two of them on September 10, 1903, while the track was so occupied. The remaining ten arrived between the 14th and 19th of September, 1903. The track had been spiked down on the 14th of September by the railway company, as unsafe for their equipment, etc. After this date the preponderance of testimony establishes that no other cars were put upon said track until the completion of the work on the 29th of September; certainly it was not generally used for the purpose of delivering and unloading. The work commenced by excavating inside of the

yard of the ice and coal company near the fence, and the rails were torn up inside, and also several feet outside, of the fence. After a week or more the building of an embankment or "fill" was commenced outside of said yard and some feet south of the existing track, preparatory to a removal of the rails on it to a greater elevation, the dirt being taken from the excavation inside of said yard. On the 14th of September the end of the track within several feet of the fence had been "jacked up," leaving the sills hanging. There was testimony tending to show that about or after the 14th the "jacking up" or removal of the dirt from under the rails extended some distance along the spur track, making it dangerous to put cars upon it. There was a fall of some feet towards the yard, necessitating the use of brakes or "choking"; the new track, when completed, being a reversal of this grade some distance in order to meet the necessary elevations of the trestle. The work was being done by the ice and coal company, under its supervision and control, by its contractors, the Southern Railway Company having nothing to do with it except to shift the rails to the new track when all was ready. There was sufficient space on the track which had not been removed to accommodate two cars from where the track was first torn up several feet from the yard of the ice and coal company, and it was possible, up to within two or three days of the completion of the work for the Southern Railway Company, to have placed and unloaded cars upon it. In not using the said track for delivery and unloading of cars within that period—that is, from the 14th of September to within two or three days of its completion—the Southern Railway Company exercised a reasonable degree of prudence in respect to the safety of its equipment and the orderly conduct of its business. The ice and coal company requested the Southern Rail-

way Company to place these cars on the spur track outside of the fence, and designated no other place for delivery. The Southern Railway Company, after such request and designation, did not actually place any of the thirteen cars, except perhaps one or two, at an accessible point of delivery. The request was not for each car, but a standing order given to an agent of the Southern Railway Company, and but once. The ice and coal company never designated any other point except upon the said spur track. There were other team tracks of the Southern Railway Company where the unloading of coal would have been feasible (and the Greensboro Gas Company and many others unloaded coal from them), though not as convenient and inexpensive as the said side track. The unloading on the team tracks would render the business of the ice and coal company unprofitable. There were several coal bins and chutes on the public tracks, but these could not always be relied upon owing to the demands of other shippers. The bins were filled at the time covered by this controversy. The notices of the arrival of all of said cars did not contain the weight or amount of charges.

The North Carolina Corporation Commission threatened to institute suits against the Southern Railway Company for heavy penalties on account of any failure to obey the order of October 31, 1903, made by said Commission. The said ice and coal company threatened to institute suit against the Southern Railway Company for heavy penalties and damages on account of failure to obey said orders. There does not appear to be any substantial conflict of testimony as to the nature of the proceedings had before the North Carolina Corporation Commission. It appears that on the 20th of October, 1903, a letter from M. W. Thompson, on behalf of the ice and coal company, addressed to the said

Commission, was received by them. It was in the form of a letter, and the formal requirements of the rules of practice of said Commission as to sections, the numbering of the same, etc., were not observed. The Commission treated the letter as a complaint, but did not serve any formal notice upon the Southern Railway Company or its agents. On the 26th of October, 1903, the Commission "'phoned" the manager of the Car Service Association to come to its office. The answer was that he was not in the city, and the Commission then requested that he come to the office of the Commission upon his return. Some days after, the first vice-president of the Southern Railway Company visited the office of the Commission on other business, and, after this was concluded, this matter (the subject of Mr. Thompson's letter) was mentioned to him. On the return of the manager of the Car Service Association he went to the office of the Commission. The letter of Mr. Thompson was read, or its contents made known to him, and the matter was discussed. Then follow conversations which took place with the Corporation Commission, which are not deemed pertinent or competent testimony. The proceedings in the Corporation Commission "were not in conformity with the rules of practice of the Commission, and the Commission did not follow them strictly except in formal matters." No witnesses were sworn in this matter or any issue joined by a pleading, nor any other hearing, except in a conversational way first with one and then another representative of the different corporations. On November 3 exceptions were filed to the order of the Corporation Commission. The hearing of these exceptions was had on November 12, 1903, at Greensboro, when witnesses were examined and arguments made by counsel. On December 10, 1903, the Commission made an order overruling the exceptions,

To the report of the standing master complainant filed twelve exceptions. Defendants filed no exceptions.

The fifth exception is to the finding of the master that, had the $146 demurrage been paid, the four cars in question would, in the opinion of the master, have been delivered on the trestle of the ice and coal company, and refusal to so deliver was solely on that ground. This exception is sustained.

Twelfth exception is to the findings of the master which relate in any way to the 13 cars which arrived in Greensboro between the 9th and 19th days of September, 1903. All testimony in relation to this finding was objected to and motion made to strike out said testimony, and the exception is now sustained, as the finding is irrelevant, and it is shown in the testimony that to have switched the 13 cars on the siding would have been dangerous to the equipment of the railroad company.

The $146 demurrage is not the question at issue in this case. It may have been the origin of the litigation, but illustrates the truism "that large oaks from little acorns grow." This was a suit to restrain threatened irreparable wrong, and a multiplicity of suits for the penalties under the North Carolina statutes for non-compliance to the orders of the Corporation Commission. These penalties are matters of statute—$500 per day—and involve much more than $2,000, if suit should be entered against the complainant for every day it has refused to obey the orders of the Corporation Commission made herein, and to recognize its right to interfere with interstate commerce.

The other exceptions, except as noted above, are deemed immaterial. The cause was referred to the master to find and report the facts, which order, after hearing testimony and asking counsel to signify in writing what facts they desired found, he has fully complied

with in an able and satisfactory manner. It is admitted that the four cars loaded with coal, the basis of the whole controversy, were interstate commerce. This is a fact. They were interstate commerce, and there is no controvery in regard thereto. Being interstate commerce, the question naturally arises, when did these particular cars lose their character in this respect, over which the North Carolina Corporation Commission has no jurisdiction, as recognized in the act of the Legislature creating that body? Until it ceased to be interstate commerce, Congress having legislated and assumed to regulate such commerce under the provisions of the Constitution, no State regulations can apply. G. C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 15 Sup. Ct., 802, 39 L. Ed., 910; G. C. & S. F. R. Co. v Miami S. S. Co., 86 Fed., 407, 30 C. C. A., 142; I. C. C. v. C., B. & Q. R. Co., 186 U. S., 320, 22 Sup. Ct., 824, 46 L. Ed., 1182. An article of interstate commerce remains wholly free from such State control as long as it is in the original package. Leisy v. Hardin, 135 U. S., 100, 10 Sup. Ct., 681, 34 L. Ed., 128; Austin v. Tenn., 179 U. S., 343, 21 Sup. Ct., 132, 45 L. Ed., 224; McGwigan v. R. R., 95 N. C., 428, 59 Am. Rep., 247; Emert v. Missouri, 156 U. S., 321, 15 Sup. Ct., 367, 30 L. Ed., 430; Scott v. Donald, 165 U. S., 95, 102, 17 Sup. Ct., 265, 41 L. Ed., 632; Rhodes v. Iowa, 170 U. S., 412, 18 Sup. Ct., 664, 42 L. Ed., 1088; Schollenberger v. Pennsylvania, 171 U. S., 12, 22, 18 Sup. Ct., 757, 43 L. Ed. 49. In the cases cited above from 95 N. C., 59 Am. Rep., the opinion was delivered by the Chief Justice, in which he says:

> "State interference with interstate commerce is absolutely forbidden, and the failure of Congress to take any action in the premises is an indication that such commerce shall remain unfettered and free, subject only to the common law. Passenger Cases,

7 Hw., 286 (12 L. Ed., 702); Hall v. De Cuir, 95 U. S., 485 (24 L. Ed., 547).

"We do not undertake to venture upon the field traversed by the court further than to say that the consequences of an opposite view that permits interfering by State legislation would be mischievous in the extreme. If one State may interfere, so may every other through which the freight is to be carried, in respect to its own chartered companies, and a succession of hostile enactments might cripple and so embarrass the roads in carrying out the contract as almost to destroy such commerce, and deprive the country of those beneficial arrangements for transporting from distant points so general in use and so conducive to the nation's prosperity and business. The former is therefore wisely committed to a single body, whose regulations may be harmonious and self-consistent."

But Congress has by legislation undertaken to regulate the matter by the act creating the Interstate Commerce Commission. Having so legislated, the State could not legislate on the subject.

In Rhodes v. Iowa, above cited, Justice White delivering the opinion of the court, it was held, in an able discussion of the question:

"Moving such goods in the station from the platform on which they are put on arrival to the freight warehouse is a part of the interstate commerce transportation."

In other words, that interstate freight retains its character as such until the actual delivery to the consignee takes place.

It will be noted that many of the cases cited, as well as the well-known South Carolina Original Package Cases, are in regard to the introduction of intoxicating liquors, or oleomargarine into States having prohibitory

statutes, and after the delivery of the opinion in this case Congress passed the act of August 8, 1890, c. 728, 26 Stat., 313 (U. S. Comp. St., 1901, p. 3177), in which it was provided that intoxicating liquors should not be exempt from State statutes. This legislation was in the interest of the police powers of the States, and conceded them the authority to regulate the introduction of intoxicating liquors, thus surrendering to the States a part of the recognized power vested in Congress; and this act has been held to be constitutional. There has been no concession of this nature in regard to other freight, such as coal, etc., and no question of the principle thus laid down that interstate commerce, except where such concession is made, retains its character as interstate commerce, and can only be regulated by Congress.

But the right of the North Carolina Corporation Commission is claimed under the police power of the State, and in the brief of counsel appears this quotation:

> "The Corporation Commission, then, being a constitutional body, with powers to enforce rules for the regulation of the operations of public and quasi-public corporations under the laws of the State, cannot be enjoined from exercising police powers of which the execution is not in conflict with the Federal Constitution, or laws made under its delegated powers. Express Co. v. R. R. Co., 111 N. C., 463, 16 S. E., 393; Bagg v. R. R. Co., 109 N. C., 279, 14 S. E., 79, 14 L. R. A., 596, 26 Am. St. Rep., 569; Martin v. Hunter's Lessee, 1 Wheat., 326, 4 L. Ed., 97; State Tax on R. R. Gross Receipts, 15 Wall, 284, 21 L. Ed., 164; Reagan v. Mercantile Trust Co., 154 U. S., 413, 14 Sup. Ct., 1060, 38 L. Ed. 1028."

It is an oversight that counsel should overlooked N. Y. v. Miln, 11 Pet., 102, 9 L. Ed., 648, the original and

leading case on this subject, and the numerous cases citing and affirming the same; what is known as the "Passenger Cases," 7 How., 286, 12 L. Ed., 702; and to have noted the exception stated in the brief "is not in conflict with the Federal Constitution or laws made under its delegated powers." An examination of all the authorities cited show that this exception is uniformly made, and it seems the case at bar, conceding the principle laid down in authorities cited to be correct, falls under the exception. In the original case in 11 Pet., 9 L. Ed., which is cited in most of the other cases, and the cases cited thereunder in Russell & Winslow's Syllabus Digest, the exception stated in the brief is uniformly made, and, Congress having legislated upon this subject of interstate commerce, the State cannot legislate thereon. To do so would be in conflict with both the Constitution of the United States and the acts of Congress passed in pursuance thereof. The police power applies more particularly to passengers and to other matters which affect public health, convenience, and morality, neither of which seem to be involved in the delivery of four cars of coal brought from one State into another.

The defendant coal and ice company was not without its remedy. The Interstate Commerce Commission hears and decides just such questions as were involved in this controversy. Lawyers frequently make mistakes as to what courts have jurisdiction, which gives rise to the numerous decisons on the subject of the jurisdiction of the courts of which the books are full. This defendant has made the common mistake of getting into the wrong tribunal, as Congress has by constitutional enactment placed in the hands of the Interstate Commerce Commission the regulation of interstate commerce, as it has full authority to do under the Constitution of the United States.

In the case at bar the jurisdiction of this court is strenuously questioned, and was ably argued by the counsel on both sides. It is contended by defendants that this is a suit against the State, and, the State being a necessary party, the bill should be dismissed; and it should further be dismissed because the amount involved does not exceed $2,000, exclusive of interest and cost. Numerous authorities are cited for the positions taken by opposing counsel. As to the contention of McNeill, Rogers & Beddingfield, that this is a suit against the State of North Carolina, the case of Scott v. Donald, 165 U. S., 107, 17 Sup. Ct., 262, 41 L. Ed., 648, in which a great many of the authorities are collated, seems to be decisive of this question. At page 112, 165 U. S., page 262, 17 Sup. Ct., 41 L. Ed., 648, the court says:

> "The objections to proceeding against State officers by injunction are that it is, in effect, a proceeding against the State itself, and it interferes with the official discretion vested in the officers. The answer to such objections is found in a long line of decisions of this Court. Osborn v. Bank of U. S., 22 U. S. (8 Wheat.), 739, 6 L. Ed., 204; Dodge v. Woolsey, 59 U. S. (18 How.), 331, 15 L. Ed., 401; Louisiana Board of Liquidation v. McComb, 92 U. S., 531, 23 L. Ed., 623; Cummings v. Merchants' Nat. Bank, 101 U. S., 153, 25 L. Ed., 903; Memphis & L. R. R. Co. v. Berry, 112 U. S., 609, 5 Sup. Ct., 299, 28 L. Ed., 837; Poindexter v. Greenhow (Va. Coupon Cases), 114 U. S., 295, 5 Sup. Ct., 903, 29 L. Ed., 194; Allen v. Baltimore & O. R. Co., 114 U. S., 315, 5 Sup. Ct., 925, 29 L. Ed., 201; Pennoyer v. McConnaughy, 140 U. S., 1, 11 Sup. Ct., 699, 35 L. Ed., 363; Velknap v. Schild, 161 U. S., 10, 16 Sup. Ct., 443, 40 L. Ed., 599, 602.

The opinion in the original case on this subject—Osborn

v. Bank of U. S., *supra*—was delivered by Chief Justice Marshall, the eighth syllabus of which is:

> "As the State itself cannot, according to the eleventh amendment of the Constitution, be made a party defendant to the suit, it may be maintained against the officers of the State, who are intrusted with the execution of such laws."

The Chief Justice said, in the above case:

> "The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agent of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal—the person who is the true source of the mischief, by whose power and for whose advantage it was done—be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against agent employed in doing the wrong which they would afford against him could his principal be enjoined in the suit."

The principle enunciated has been cited and affirmed in a number of cases too numerous to cite. There have, from time to time, been dissenting opinions, but the Supreme Court has held strictly to the principle laid down by the Chief Justice.

It is not unnatural that a body having the powers of a corporation commission should imagine itself the State, but it is in reality a mere agency of the State, and may, under the authorities, be restrained from executing an unconstitutional act, or doing an unconstitutional thing under a constitutional act.

The purpose of this suit is stated in the opening of defendant's brief, as follows:

> "The purpose of the bill is to properly enjoin the defendants, the Greensboro Coal & Ice Company, McNeill, Rogers & Beddingfield, acting as the North Carolina Corporation Commission, from bringing suits for penalties or damages against complainant because of its failure to comply with its order of the said Corporation Commission as to placing four carloads of coal transported from other States upon the spur track and trestle of the defendant company at Greensboro."

This purpose of the bill is properly stated in part. The suits were threatened, though denied in the verified answers, as shown in the evidence by a letter from the coal and ice company, and by a letter or telegram from the chairman of the Corporation Commission, and as found by the master. These suits would involve more than $2,000. It should be added the purpose of the bill was also to enjoin the Corporation Commission from compelling the complainant to switch to a consignee's private side track, irrespective of the rules and regulations of the Southern Railway Company, and to deny to it the right to conduct its business, both State and inter-State, which the master finds would entail a loss to the Southern Railway Company, much in excess of $2,000, the right of the complainant railway company to conduct its inter-State business at Greensboro, to dispose of its rolling stock and distribute it, to refuse to permit its cars to be placed on private sidings, according to its reasonable rules. The amount involved amounts to many thousand dollars, far in excess of $2,000, as found by the master.

True, the Corporation Commission of North Carolina is, in words, made a court of record, and it is conceded the Circuit Court of the United States cannot restrain a State court, but the Corporation Commission is vested with powers not judicial, some of which have been held to be legislative, some executive, and the restriction on the injunction of this court as to State courts does not apply, especially inasmuch as the acts complained of and asked to be en-

joined are not judicial acts. As to these acts, it is a State agency, not acting judicially.

Many interesting questions were discussed in the argument and in the briefs, which it is not deemed necessary to consider for the decision of the case at bar. From what has been said, there appears all the elements necessary to give the Circuit Court of the United States jurisdiction.

The questions discussed in the argument are ignored without prejudice, and it is considered, ordered and decreed that the restraining order heretofore entered be made perpetual. A decree will be drawn accordingly.

FILE COPY.

Supreme Court of the United States.

October Term 1905.

Office Supreme Court U. S.
FILED
MAR 30 1906
JAMES H. McKENNEY,
Clerk.

No. 370
and
No. 594.

FRANKLIN McNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, AND THE GREENSBORO ICE AND COAL COMPANY,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal From the Circuit Court of the United States for the Eastern District of North Carolina.

Cross Appeal in Same Case.

Legal Decisions in Car Service Cases
Appendix B to Brief of

FABIUS H. BUSBEE,
CLAUDIAN B. NORTHROP,
Solicitors for Southern Railway Company.

LEGAL DECISIONS

IN

CAR SERVICE CASES,

PUBLISHED BY THE

National Association of Car Service Managers.

1904.

IN ACCORDANCE with a resolution presented to the National Association of Car Service Managers in annual convention at Chicago, Ill., June, 1903, the following compilation of Decisions and Opinions in Car Service Cases is respectfully submitted.

The Decisions are arranged as nearly as possible, in chronological order.

For all reported cases the legal citation is given.

The following index is an endeavor to afford ready reference to the various points of law established by these decisions.

A. G. THOMASON,
Secretary.

SCRANTON, PA., May 12th, 1904.

INDEX.

Supreme Court of Massachusetts 1

1872.

Miller vs. Mansfield.

Goods held by railroad subject to lien for demurrage. Charge two dollars per day after twenty-four hours—Consignee paid under protest and sued in District Court—Jury verdict in favor of Consignee—Supreme Court Justice Morton reverses decision and finds for railroad.

Railroad and Warehouse Commission of Illinois .. 3

October, 1890.

Union Brewing Co. of Peoria vs. C. B. & Q. R. R.

No reason in law or justice why detention to cars should not be paid for.

Magistrate's Court, Columbus, O. 3

January, 1891.

Powell vs. P. C. C. & St. L. Ry.

Action of Replevin—Railroad enforced lien for demurrage—Consignee bound by bill of lading contract made by shipper—Railroad has the right to hold goods for charges.

Railroad Commission of Alabama 7

May, 1891.

Complaint of Youngblood & Ehrman.

Prayer for relief from demurrage charges—Commission rules such charges are lawful

Supreme Court of Georgia 8

October, 1891.

Miller & Co. vs. Georgia Ry. Co.

Competent for common carrier to enforce a reasonable demurrage rule—Rate of one dollar per car per day not unreasonable because of varying sizes of cars;

because fractions of days are charged for as whole days; nor because customary rate of storage in warehouses or elevators is lower; nor, as a matter of law, for any cause—Rules not invalid because promulgated by a board of persons representing a combination of carriers—Rules lawful whether indicated on bills of lading or not as long as customers have notice of regulation prior to shipment—Immaterial whether consigned direct or to order—Cars understood to be accessible to unloader as long as carrier is ready to render them so within the shortest practicable time after notice that customer is ready to unload.

Law and Equity Court, Louisville, Ky. 19

November, 1891.

Kentucky Wagon Mfg. Co. vs. L. & N. R. R.

Forty-eight hours time allowed is reasonable—Exceptional circumstances do not affect the rule—Charge of one dollar per day is reasonable—Not necessary to consult shippers or consignees in framing the rule—Necessary and reasonable rules for the conduct of transportation not invalid because no self-inflicted penalties upon the carriers are contained in such rules—Car Service Associations not organized in antagonism to legitimate competition—Delivering road is the special owner and bailee of all cars in its possession.

Court of Appeals, Kentucky 22

October, 1895.

Kentucky Wagon Mfg. Co. vs. O. & M. Ry.

There may be a reasonable charge imposed by carriers for detention to cars beyond a reasonable time—Rules may be applied through an association, as two or more carriers may do jointly what each might do separately—Time of forty-eight hours and charge of one dollar are reasonable—Rules not vitiated by failure to consult shippers in framing them—Demurrage associations are not illegal combinations restrictive of competition—Each road has the right to control all cars in its possession—Railroads have no right to refuse to receive freight from or switch cars for a shipper because he owes to them or to other members of the association car service fees which he refuses to pay, or because he and other shippers have combined to resist the enforcement of the reasonable rules of the association—Shipments incurring charges may be held by the carriers until charges are paid.

District Court, Woodbury County, Iowa 32

January, 1892.

C. M. & St. P. Ry. vs. Pioneer Fuel Co.

Defendant denied right of carrier to recover for detention to cars, because no contract existed in which defendant recognized such right—Court held that indefinite detention to cars would necessitate a large and unnecessary increase of the capital invested and a corresponding increase in freight charges—Public right to economical service thereby violated—Failure to enforce car service rules would put burden of increased freight rates upon the general public, instead of upon the persons who get the unwarranted use of cars and tracks—When property is used after notice of charge, the law implies a contract to pay for such use—Can conceive of no more reasonable and necessary regulation than the one we are asked to enforce in this action.

District Court, Arapahoe County, Colorado 34

March, 1892.

U. P. D. & G. Ry. vs. Cooke.

Railroads have right to enforce reasonable rules—Forty-eight hours a reasonable time—Two dollars per car per day a reasonable charge—Rules not invalid because shipper is not consulted in framing them—If rules were known to defendant specific notice not necessary—Rule operative whether indicated on bills of lading or not—Not material that shipment was made contrary to wish of defendant.

Law and Equity Court, Louisville, Ky. 35

June, 1892.

Newport News & Miss. Valley Co. vs. J. Schwartzwalder & Son.

Suit brought by railroad to recover car service charges—Jury returned verdict in favor of the railroad and Court gave judgment for amount claimed.

Common Pleas Court, Louisville, Ky. 35

June, 1892.

O. & M. Ry. vs. Patrick Bannon.

Railroad sent goods to public store after demurrage had accrued. Consignee replevined—Railroad answered claiming demurrage charges, switching charges to warehouse and storage charges—Court gave railroad judgment, saying he did not see how carriers could have cars to furnish shippers without the car service rules.

Court of Common Pleas, Butler County, Pa. 36

September, 1892.

P. & W. Ry. vs. Gilliland.

Railroad brought suit to enforce payment of demurrage—Defendant averred that shipment was forwarded by shipper one month too soon—Denied right of railroads to charge and collect demurrage—Court gave railroad judgment—Upon arrival of shipment at destination the liability of railroad as carrier ceased, and liability as warehouseman began—Can conceive of no more necessary and reasonable regulation than the demurrage rule, wholly in the interest of shippers—Common carriers compelled to accept goods for transportation, and it would be unjust not to enforce a corresponding duty on the shipper, to not detain or deprive the common carrier of the use of the vehicles which the law places at his command.

Circuit Court, Oneida County, Wis. 45

October, 1892.

M. L. S. & W. Ry. vs. Lynch.

Railroad unloaded shipment, holding it for demurrage charges—Consignee removed shipment against protest of carrier—Consignee claimed car not properly placed and claimed $500.00 damages—Jury decided car was properly placed—Court decided that demurrage was reasonable both as to time allowed and amount charged—Judgment for railroad with costs.

Sixth District Court of Rhode Island 46

At Providence, January, 1893.

Goff vs. Old Colony R. R.

Railroad held shipment for payment of demurrage charges Consignee sued for $100.00 damages—Court affirmed right of railroad to hold freight for demurrage charges and gave judgment for the railroad.

Circuit Court of Jefferson County, W. Va. 46

March, 1893.

Geo. Campbell Co. vs. B. & O. R. R.

Railroad held two cars of bark for demurrage charges, and finally sold for freight and demurrage—Consignee sued for $500.00 damages—Jury waived—Court gave judgment in favor of railroad for $14.88 being the difference between value of bark sold and the

amount of freight and demurrage charges—Supreme Court affirmed the above decision, and unanimously refused an appeal.

Circuit Court of Cook County. Ill. 47

November, 1893.

Thomas Purcell et al vs. P. C. C. & St. L. Ry.

Railroad held cars loaded with coal to enforce payment of demurrage—Consignees obtained mandatory injunction compelling delivery—Case heard by Master in Chancery and verdict given railroad—Court sustained the Master and holds that carriers may enforce a lien for demurrage due on the particular shipment held, such as coal.

Supreme Court of Appeals of Virginia 53

January, 1894.

N. & W. R. R. vs. Adams, Clement & Co.

Suit in assumpsit to recover demurrage paid—Circuit Court of Roanoke County decided in favor of consignee—Case appealed by railroad—Supreme Court reversed the Circuit Court, dismissing consignee's suit—Court stated that without the demurrage rule the business of the railroad and the public service must necessarily suffer.

Supreme Court, Chenango County, N. Y. 58

March, 1894.

Warren L. Scott vs. D., L. & W. R. R.

Railroad held part of shipment of lumber for demurrage charges—Consignee sued for conversion of property—Court gave verdict to railroad holding that—Bill of lading containing demurrage clause is binding contract—Amount of charge is reasonable—That lien was not waived by railroad because it accepted freight charges and took consignee's receipt for property—The railroad rightfully detained the lumber for its demurrage charges.

County Court, Winnebago County, Wis. 65

May, 1894.

C. & N. W. Ry. vs. John Strange Paper Co.

Railroad sued consignee for demurrage—Jury waived—Court gave railroad judgment.

County Court, Winnebago County, Wis. 65

May, 1894.

M. & N. R. R. vs. John Strange Paper Co.

Railroad sued consignee for demurrage—Jury waived—Consignee did not dispute records, or right to charge demurrage—But counter claimed for delays by railroad in placing cars—Counter claim withdrawn—Judgment given to railroad.

Court of Common Pleas No. 3, Hamilton Co., O. 66

October, 1894.

Dawson, Blackmore & Co. et al vs. C. C. C. & St. L. Ry.

Consignee sued to recover car service charges paid under protest, and under alleged coercion—Jury trial—Judge charged that carriers have common law right to charge for delay to cars—A reasonable charge is what such cars would earn if not detained—Question of delivery of order shipment on verbal directions without bill of lading—Question of notice by posting list on change—Jury returned verdict for the railroad.

Law and Equity Court, Richmond, Va. 73

March, 1895.

Antrim & Sons vs. R. F. & P. R. R.

Action of detinue—Demurrage earned by reason of shipment being billed "to order" and no local consignee shown—Railroad put in special plea asserting lien upon the shipment for demurrage—Court ruled that shipments "to order" are subject to same rule as shipments direct—Free time to begin to run from arrival of car—Railroad has right of lien.

Superior Court of Tippecanoe County, Ind. 74

April, 1895.

La Fayette Lumber & Mfg. Co. vs. C. C. C. & St. L. Ry.

Action of replevin—Part shipment of lumber held for demurrage—Consignee replevined—Consignee claimed discrimination in that forty-eight hours additional were allowed on coal and coke—And in that demurrage rules were not enforced at all points—Court ruled that the free time was reasonable—Charge not excessive—No discrimination against lumber dealers by additional time allowed coal dealers—No discrimination by reason of rules not being enforced at all points—Judgment given to railroad.

Railroad and Warehouse Commission, Missouri 76

April, 1895.

Coal Dealers Protective Ass'n vs. St. Louis Car Service Ass'n.

Complaint of unjust and unreasonable demurrage charges —And prayer for restoration of charge of fifty cents per car per day while on private tracks—Also rule to penalize railroads for delay in removing cars from side tracks—Complaint dismissed and rules sustained as just and reasonable.

Circuit Court, Jackson County, Mo. 77

February, 1896.

Griffith vs. K. C. F. S. & M. R. R.

Railroad held shipment to enforce payment of demurrage — Consignee replevined — Question is demurrage charge legal—Has carrier a lien for such charges—Court ruled in the affirmative—Public convenience and trade would be seriously interfered with if individuals were allowed to unnecessarily detain cars for storage purposes.

Circuit Court, Coles County, Ill. 81

April, 1896.

Fuller & Fuller vs. C. C. C. & St. L. Ry.

Railroad held shipments for demurrage charges—Consignee replevined—Jury waived—Court gave judgment to railroad—Common law gives lien for reasonable charges for care bestowed—Time allowed was reasonable—To recognize a lien promotes justice and avoids litigation—Object of demurrage rule is to secure to the railroads and public the use of cars—To fail to recognize this rule would be disastrous to public interests.

Circuit Court, St. Louis, Mo. 85

June, 1896.

Wabash R. R. vs. Berry-Horn Coal Co.

Action by railroad for demurrage—Defense argued that the charge was illegal and unreasonable—That forty-eight of the cars charged for were owned by other roads —That service was bad, cars bunched, and railroad not entitled to recover—That soft coal must be handled from cars to wagons to avoid disintegration due to frequent handling and cars needed as warehouses —Cars on private track and charge of one dollar per

day therefore a discrimination—Court held that carrier has right to a reasonable charge—That charge and time allowed are reasonable—That delivering road is special owner or bailee of foreign cars—That question of good or bad service not pertinent to question of legality of demurrage charges—Judgment given to railroad.

Circuit Court, Wayne County, Mich. 87

June, 1896.

McEachran & Co. vs. G. T. Ry.

Three cars of cord wood delayed beyond free time for unloading by delay in receipt of freight charges—Consignee claimed freight charges paid by check mailed within proper time—Railroad asserted lien for demurrage, and sent goods to public warehouse—Consignee sued for $500.00 damages—Court ruled that car service rules were valid and reasonable—Verdict for the railroad.

Supreme Court, District of Columbia 89

June, 1897.

Herr vs. B & P. R. R.

Railroad held goods for demurrage, and sold them for such charges—Before goods were sold consignee sued in action of trover to recover $5000 damages—Court held that contract made by shipper including demurrage clause, was binding upon consignee even though latter was ignorant of the demurrage rules—Court ruled that railroad had lien for demurrage by both the contract and the common law—That consignee was bound by the contract made with shippers because they were the owners of the goods at the time of making shipment, and because they were the consignee's agents in making the shipment—Verdict for railroad.

Circuit Court, Jefferson County, Ky. 95

April, 1898.

Duckwall vs. C. C. C. & St. L. Ry.

Consignee obtained mandatory injunction compelling railroad to deliver cars on private siding—Railroad had refused such delivery because owner owed car service—Judge ruled that this case is similar to Kentucky Wagon Mfg Co.—Consignee perpetrated first wrong in refusing to pay car service charges—Should pay such charges relying upon the Association for redress, or failing that, the courts—Injunction dissolved.

Circuit Court, Mobile County, Ala. **99**

June, 1898.

Gulf City Cons. Co. vs. L. & N. R. R.

Cars delayed because freight charges exceeded the rate stipulated in bills of lading—Demurrage paid under protest and suit brought to recover—Court ruled that railroad had right to charge demurrage pending payment of all freight charges—Verdict for railroad.

Supreme Court, Georgia **101**

March, 1900.

Dixon et al vs. C. of G. Ry.

Goods held for prepayment of freight—Consignee denied right of carrier to charge demurrage for such delay—Relation of railroad to shipper is that of warehouseman until freight is ready for forwarding—Demurrage as applied to detention of cars is legal—Carrier has right of lien for demurrage—Judgment for railroad.

Supreme Court, Tennessee **117**

December, 1900.

Swan vs. L. & N. R. R.

Delivery wanted on enclosed private siding—Goods withheld from such delivery pending payment of freight charges—Meantime demurrage accrued and goods held for payment of demurrage—Consigned sued charging conversion—Court rules that demurrage is legal—Time allowed and amount charged are reasonable—Under bill of lading contract carrier has lien for demurrage—Carrier not bound to deliver on private siding until freight charges are paid—Judgment for railroad.

Railroad & Warehouse Commission, Missouri ... **121**

June, 1901.

Darlington & Co. vs. Central Car Service Ass'n.

Cars delayed on hold tracks awaiting orders—Commission ruled that charges were correct—Consignees doing business on private sidings should keep such sidings clear and in condition for use to their full capacity—Public interest demands full compliance with car service rules—Complaint dismissed.

Superior Court, Catawba County, N. C. 125

July, 1901.

Latta-Martin Pump Co. vs. So. Ry.

Railroad held goods for payment of demurrage—Consignee replevined—Trial Justice decided in favor of consignee—Railroad appealed—Superior Court declared railroad had right of possession—Demurrage rules reasonable—Judgment for railroad.

Supreme Court, Pennsylvania 126

Opinion, February, 1902.

P. R. R. vs. Midvale Steel Co.

Common carrier has an unquestionable right to enforce reasonable demurrage rules—Validity of rules not affected by failure of carrier to consult shipper in framing them—Rendering of bill for demurrage is best possible form of notice of rule.

Court of Appeals, St. Louis, Mo. 130

October, 1902.

Darlington vs. Mo. Pa. Ry.

Two cars of lumber placed on private siding—Railroad removed cars and held goods for demurrage—Lower Court gave consignee verdict—Court of Appeals ruled that railroad did not part with possession and control of cars and contents—Railroad had common law lien for storage—Right to demurrage exists independent of contract or statute—Individual convenience should be subordinate to public good—Country's commerce is obstructed by use of cars for storage purposes.

United States Treasury Decision 135

May, 1903.

Edward Frolich Class Co. Inquiry.

A lien for demurrage, where it exists, is embraced by section 2981 Revised Statutes.

Circuit Court, Tazewell County, Ill. 139

September, 1903.

Smith & Co. vs. P. & P. U. Ry.

Consignee averred time allowed for unloading unreasonable when two or more cars arrived together—And that

stipulations in bills of lading have no binding effect upon consignee unless he assents thereto—Court charged jury to return verdict for railroad—Carriers have legal right to enforce reasonable rules to prevent delay to cars—Have lien for demurrage charges.

Circuit Court, St. Joseph County, Ind. **140**

September, 1903.

Miller et al vs. T. H. & L. Ry.

Railroad held goods for demurrage charges—Consignee replevined—Court ruled that carriers have lien for car service charges—Verdict for the railroad.

Supreme Court, Illinois **147**

October, 1903.

Schumacher vs. C. & N. W. Ry.

Railroad held part of shipment of coke for payment of car service charges—Consignee replevined—Circuit Court, Appellate Court and Supreme Court sustain the right of railroad to lien for such charges—Public interests require that cars shall not be unreasonably detained—Time allowed for unloading should not be affected by distance goods must be hauled, or means of unloading employed—The object of car service rules a public benefit—Charge of $1.00 per day very reasonable.

Supreme Court, Mississippi **227**

October, 1903.

N. O. & N. E. R. R. vs. George & Co.

Railroad held goods for demurrage—Consignee replevined—Cars held on storage track, consignee's private siding, used jointly with another consignee, being full of cars—Six cars delivered and six held for demurrage on all—Court held demurrage rules valid—And sustained right of railroad to lien upon the goods for demurrage charges.

District Court, Black Hawk County, Ia. **242**

January, 1904.

Towsend & Merrill vs. R. Rs.

Railroad held shipments of lumber for car service charges—Consignees paid under protest, and obtained indictment of railroads for conspiracy in combining in Car

Service Association—Railroads contended statute unconstitutional—Demurrer sustained.

United States Circuit Court, Chicago, Ill. **245**

1904.

Coal Shippers' Ass'n of Chicago vs. Chicago Car Service Ass'n.

Letter of C. W. Sanford, Manager Chicago Car Service Ass'n, to Hon. S. H. Bethea, United States District Attorney, explaining organization and purpose of car service associations.

Press of
People's Printing Company
Dime Bank Building.
Scranton, Pa.

LEGAL DECISIONS AND OPINIONS.

SUPREME COURT OF MASSACHUSETTS,
112 MASS. 260.

MILLER

VS.

MANSFIELD, AGENT HOUSATONIC R. R. CO.

This is a case where a car load (containing one hundred barrels) of flour was placed for delivery on the tracks of the Housatonic R. R. Co. at Great Barrington, Mass., on Feb. 14th, 1872, and the consignee was notified on the same date that he would be allowed 24 hours in which to unload the car, and that the charge after 24 hours would be $2.00 per day for demurrage. The consignee was aware of the arrival of the car, but deferred unloading until the 20th of February, when he tendered the agent the amount of freight charges, but declined to pay the demurrage. The agent refused to permit of the car being unloaded and held the flour as a lien for the charges.

Subsequently the consignee paid all charges under protest and removed the flour and then brought suit in the District Court, before a jury, for damages. The case was decided in his favor. It was appealed by the Railroad Co. and the following is the opinion of Justice Morton, of the Supreme Court of Massachusetts:

"For the purpose of this hearing all the facts which the defendant offered to show are to be taken as estab-

lished. We must assume, therefore, that there was an existing regulation and usage of the Housatonic R. R. Co. that car-load freight, like that of plaintiff's, should be unloaded by the consignees within 24 hours after notice to him of their arrival; that for delay in unloading after 24 hours the consignee should pay $2.00 per day for each car belonging to other Railroad Companies, and that this regulation and usage was known to the plaintiff."

Being known to the plaintiff it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted in reference to it. It enters into and forms part of their contract, and the Railroad Company is entitled to recover the amount fixed by the usage, by virtue of the plaintiff's promise to pay it. This charge is, in its essential character a charge for storage. After the arrival of the goods at their destination the liability of the Company, as common carriers, ceased, but they became liable for the custody of the goods as warehousemen, and, if they were not removed within a reasonable time, were entitled to compensation, for which they had a lien as warehousemen. "Norway Plains Co. vs. Boston & Maine R. R., 1 Gray, 263." The parties by their agreement, fixed the rate of compensation which the company should receive and the time when it should commence. It is not material that the goods remained in the car instead of being put into a storehouse. The responsibility of the company for their custody was the same as if they had been stored, and they had the right to retain them until their charges were paid.

We are of the opinion, therefore, that instructions should have been given (in the District Court) substantially as requested by the defendant, and that the presiding judge erred in the instructions which he gave."

RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF ILLINOIS.

COMPLAINT No. 64.

HEARD AT CHICAGO, OCTOBER 4, 1890.

UNION BREWING COMPANY OF PEORIA

VS.

THE CHICAGO, BURLINGTON & QUINCY R. R. CO.

OPINION OF PHILLIPS, COMMISSIONER.

No reason is perceived in law or justice why any unreasonable and unnecessary detention of cars by consignees should not be paid for. Car demurrage is an important subject which has arisen in a practical way only within late years, and long after our statutes for the regulation of railroads was passed.

It does not, however, follow that because there is no statutory regulation of the question, there is no law.

MAGISTRATES' COURT, COLUMBUS, O., JAN., 1891.

FRANK E. POWELL

VS.

P. C. C. & ST. L. RY. CO.

This is an action of replevin brought by the plaintiff to recover of the defendant the possession of a car load of lumber which he claims is unlawfully detained from him

by the defendant. The parties have waived all technical questions and ask that the case be decided solely on the merits of the real controversy between them. The real question at issue is the right of the railroad company to demand payment of the so-called car service charges as a lien on the property and to hold the lumber until these charges are paid. This is an important question and has excited considerable attention. It affects the rights of all the railroad companies and of every merchant or dealer receiving freight by the car load, and should be settled beyond legal controversy for the interest of all parties concerned in shipping goods.

The facts are not controverted. Mr. Powell bought a car load of lumber in Michigan of a lumber company there, to be delivered to him on board the cars at Kalkaska. The lumber company duly delivered the lumber to the railroad company there, receiving a bill of lading in the usual form, signed by the agent of the railroad company. The bill of lading was not sent to Mr. Powell by the lumber company until after the suit was commenced, when Mr. Powell wrote for it, and it was then sent to him. The lumber arrived here somewhere from the first to the third of November, and on the latter day Mr. Powell received notice by postal card of its arrival. He did not send his teams for the lumber until more than forty-eight hours after receiving the notice, and when the teams arrived no objection was made to delivering the lumber, on account of Mr. Powell's not having the bill of lading, but the drivers were informed that there was $1.00 car service charges which would have to be paid before delivering. Mr. Powell refused to pay, and from time to time thereafter demanded the lumber, but the railroad company always refused to deliver it to him unless he paid the car service charges of $1.00 per day for every day the car was detained after the forty-eight hours. The matter remained in this condition until December 11th, when plaintiff brought this action and got possession of the lumber by writ of replevin. The car was thus detained on the tracks of the company thirty-three days after the forty-eight hours, not counting Sundays or legal holidays. The bill of lading, among other terms and conditions, contains the following:

"—Fifth—Property not moved by the person or party

entitled to receive it within twenty-four hours after its arrival at destination, may be kept in the car, depot or place of delivery of the carrier, at the sole risk of the owner of said property, or may be, at the option of the carrier, removed or otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for the detention of any car, and for the use of track, after the car has been held forty-eight hours for unloading; and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor."

The plaintiff claims:

First—That the contract was one which a common carrier (railroad company) has no authority to make. Section 3838 of the Rev. Stat. is as follows: "Section 3838 (common carrier companies). A corporation organized as and for a common carrier company shall have the following powers:

1. To make all contracts that it shall be lawful for natural persons to make for the carriage of persons and the storage, forwarding, carriage and delivery of property, but subject to the same liabilities."

As there was nothing immoral in the contract and nothing prohibited by any statute, and the contract was plainly within the scope of the railroad company, we see no reason why the contract was not one which the railroad company was authorized to make.

Second—The plaintiff further claims that there is nothing in the contract which gives the railroad company the right to claim a lien on the lumber for the car service charges. A part of the bill of lading, above set forth, reads as follows: "The delivery carrier may make a reasonable charge per day for the detention of any car, and for the use of the track after the car has been held forty-eight hours for unloading; and may add such charge to all other charges hereunder and hold said property subject to a lien therefor." This seems about as plain as language can make it, and if the contract is binding on the parties, it clearly means that the railroad company

may hold the goods until the reasonable charges for the detention of the car are paid.

The plaintiff claims:

Third—That even if the contract is legal and binding on the parties who made it in Michigan, Mr. Powell, not having signed it or seen it before he demanded the lumber, it is claimed, he was not bound by it.

The defendant claims that when Mr. Powell agreed with the lumber company in Michigan to deliver the lumber to him on board the cars in Michigan he thereby authorized the lumber company to make a contract of shipment with the railroad company, and that the lumber company thereby became his agent for that purpose, and that he is bound by the contract which it made; and further that ratified the contract which the lumber company had made. And this is the main question argued in the case.

In Angell, on Carriers, page 359, it is said: "After consignee or indorsee of a bill of lading, containing the clause making the goods deliverable to him on payment of freight, accepts the consignment, there is either a legal presumption that he contracted to pay the freight, or evidence from which the jury would be warranted in finding a contract by the consignee to pay the freight."

I also find in Lawson, on Contracts of Carriers, page 327, the following: "It may be said generally that authority given to an agent to ship property carries with it an authority to accept a bill of lading or to make a contract containing exemptions from liability." And the same author says on page 328: "The consignor is regarded as the agent of the consignee for the purpose of entering into contracts for their carriage."

In the case of Seaif vs. Tobin, an English case, 3 B. & A. D. 523, the court says: "That the consignee, by taking the goods, adopted the contract, that is, the contract in the bill of lading, whereby the master agreed with the shipper to deliver the goods to the consignee, he paying demurrage and freight."

From those authorities it would seem clear that when Mr. Powell bought the lumber of the lumber company to be delivered on board the cars at Kalkaska, he thereby

authorized the lumber company as his agent, to make a contract of shipment with the railroad company. It makes no difference that he never saw the contract. A principal is bound by the acts of his agent within the scope of the agent's authority. His ignorance of what his agent has done, of course, does not release him.

I think, therefore, that Mr. Powell was bound by this contract and became liable to pay the car service charges after the forty-eight hours, and that the railroad company has a right to hold the goods until the charges were paid.

RAILROAD COMMISSION OF THE STATE OF ALABAMA.

MAY, 1891.

HENRY R. SHORTER,
President Railroad Commission of Alabama.

W. C. TUNSTALL,
Associate Commissioner.

Youngblood & Ehrman, lumber dealers of Birmingham, Ala., May 8, 1891, applied to the above-named commission for relief from the demurrage rules.

In dismissing the complaint the commissioner used these words: "When the charge is made by a railroad company only for the detention of cars and holding the side tracks beyond a reasonable time after arrival and notice given to consignees, such detention being by the negligence or delay by the patron, we are of the opinion that a charge for such detention and use of the track, reasonable in amount, is lawful and may be properly collected by the carrying company."

SUPREME COURT OF GEORGIA, NO. 17
AUGUSTA, OCTOBER, 1891.

88 GEORGIA, 563.

MILLER & CO.

VS.

THE GEORGIA RAILWAY CO.

OPINION BY HON. JUSTICE SIMMONS.

By the Court:

1. It is competent for a common carrier whose customers at their option have the privilege of unloading for themselves the vehicles in which their freights are shipped, to adopt and enforce a reasonable regulation as to the time within which the vehicles may be unloaded free of any expense for storage, and to fix a reasonable rate per day at which storage will thereafter be charged for the use of such vehicles so long as they remain unloaded.

2. A rate of one dollar per day for each railroad car thus devoted to the use of storing freight is not necessarily unreasonable because cars are of different sizes and vary in capacity, nor because a fraction of a day is charged for as a whole day, nor because the customary rate of storage in warehouses or elevators is much lower; nor is it, as matter of law, unreasonable for any cause.

3. A particular common carrier, though a corporation, makes a regulation its own by adopting it and acting upon it, irrespective of the source from whence it is derived; and therefore, that it was promulgated by a person or board of persons representing a combination of such carriers would make no difference.

4. As between the carrier and customers who have notice of the regulation before shipments are made, the

regulation is operative whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor with the customary direction to notify the customer, or directly to the customer himself.

5. In construing the phraseology of a regulation expressed in this language, "it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that when the period for such demurrage charge commences, they are to remain accessible to the consignee for unloading purposes," the course and exigencies of business are necessarily to be regarded; and hence the cars, after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible if the carrier is always ready to render them so within the shortest practicable time, not longer than a few hours, after being notified that the customer is ready to unload. Judgment affirmed.

The Georgia Railroad Company sued Miller & Company for the sum of $892, besides interest, the declaration containing two counts, as follows: (1) "On the first of January, 1890, and on various days thereafter up to the time of filing this complaint, petitioner stored on its tracks in said county certain car-loads of corn, wheat, grain and other produce, at the special instance and request of said Miller & Company, by means whereof said Miller & Company became indebted to your petitioner for said storage at the rate of one dollar per day for each and every of said carloads, amounting to the aforesaid sum of $892. (2) Your petitioner further shows that said Miller & Company is further indebted to your petitioner in the sum of $892, besides interest; for that heretofore, to wit, before the first day of January, 1890, your petitioner, who is a common carrier of goods and merchandise, made and put in operation a reasonable rule or regulation for the conduct of its business, of which rule or regulation said Miller & Company had notice, by virtue of which said Miller & Company became liable to pay to your petitioner the sum of one dollar for every day commencing forty-eight hours after notice of arrival, on each and every carload of property stored by your petitioner on its tracks or elsewhere.

Your petitioner shows that after said first day of January, 1890, and up to the time of filing this complaint, your petitioner has so stored a large number of carloads of property, a schedule of which is hereunto annexed; by means whereof said Miller & Company have become indebted to your petitioner in the sum of $892, besides interest. Your petitioner shows that said Miller & Company fail and refuse to pay said sum," etc.

The rule or regulation here referred to is as follows:

DEMURRAGE RULES.

CONCERNING LOADED CARS TO BE UNLOADED BY CONSIGNEES.

"Bulk meats, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone, wood and such other freights in bulk or otherwise, as it may be a stipulation of the rates thereupon, or contract for the transportation thereof, or where it is the custom for the cars to be loaded and unloaded by the owners of the property, which is not unloaded from the cars containing it in forty-eight hours, not including Sundays or legal holidays, computed from ten o'clock a. m. of the day following the day of arrival, shall be subjected thereafter to a charge for demurrage of one dollar for each day or fraction of a day that said car or cars remain loaded in the possession of the company, by whom to be delivered as the last carrier at interest; it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that when the period of such demurrage charges commences they are to remain accessible to the consignee for unloading purposes."

The jury found in favor of the plaintiff, and the defendants made a motion for a new trial, which was overruled, and they excepted. Without undertaking to discuss separately and in their order the numerous grounds of the motion, it is sufficient to say that, in addition to the general objections that the verdict is contrary to law and the evidence, they complain in substance as follows:

(1) That as matter of law, a railroad company is not entitled to charge "demurrage" or storage on cars remain-

ing unloaded on its tracks, and hence the rule in question is invalid and the defendants are not subject to the charges recovered. (2) That the charge fixed by this rule is unreasonable. (3) That the rule was not promulgated by the proper authority, but emanated from a combination of persons other than the board of directors of the Georgia Railroad. (4) That the regulation is inoperative because not indicated upon the bill of lading. (5) That the cars were not accessible during the whole period for which demurrage was charged.

1. It is the undoubted right of a common carrier to adopt and enforce, as between itself and its customers, any reasonable regulation for the conduct of its business, the purpose and effect of which is the protection of the carrier and the benefit of the public. The rule in question, we think, falls clearly within the scope of this power. It seeks to prevent the diversion and detention of cars from the legitimate work of transportation, as well as to secure compensation for service not otherwise paid for, by prescribing, in cases where by contract or custom the carrier is under no duty to unload the cars but they are to be unloaded by the customer, a rate per diem in the nature of a charge for storage, to begin at a certain time after the cars have been delivered to the customer or placed at his disposal for unloading. Such a regulation cannot be regarded as unreasonable so long as a reasonable time is allowed for unloading and so long as the charge for the use of the cars beyond that time is not excessive. The law compels the carrier to receive the goods of the public and to transport and deliver them within a reasonable time. (Code, sec. 2029; 2 Am. & Eng. Enc. of L., Tit. Carriers, p. 787.) To do this it is necessary that the means of transportation shall be under the carrier's control, and that after the duty of carriage has been performed, its vehicles shall not be converted into storehouses, at the will of consignees, to remain such indefinitely and without compensation. If no check could be placed upon such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers, thus hampered in their facilities and unable to foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic or perform with dis-

patch their legitimate function. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freights, thus requiring it to provide extra facilities, as well as to render extra service, without compensation beyond that received for transportation. It would result in the accumulation of cars on the carrier's tracks and the obstruction in a greater or less degree of the movement and unloading of trains. Not only would loss ensue to the carrier, but consignees and shippers in general and the people at large must suffer seriously from this hindrance to the due and regular course of transportation. In this matter the public have rights paramount to those of any individual or class of individuals, and the business of the common carrier must be so conducted so as to subserve the general interest and convenience. Especially is this true as to railroad companies, in view of the important franchises granted them by the public, and the use and control thus acquired of highways upon which the commerce of the country is so largely dependent.

The need of regulations of the kind in question is well illustrated by the evidence in this case. The general manager of the plaintiff testified that before this rule was adopted, consignees were often dilatory in removing freight from the cars in which it was shipped, and "the cars were detained day after day, and days lengthened into weeks, until our transportation work was subjected to immeasurable embarrassment; the transportation of the company was well nigh paralyzed,—not for the lack of cars, for we had plenty, but because our cars were converted into warehouses. The trouble grew and finally culminated in a threatened blockage throughout the country. It has been a part of our experience to be threatened with suit by the shipper for not moving the freight promptly. We are supposed to always have cars ready to transport any freight that is offered; we endeavor to make proper arrangements to do so; but the trouble was that when A had freight to ship B had our cars and we could not get them."

It was contended by counsel for the plaintiff in error that the railroad company could unload the cars into a warehouse or elevator, and thus avoid detention. On the other hand, counsel for the railroad company contended

that in the cases provided for by this rule, that is, where it is a stipulation of the rates or contract for transportation, or is the custom for the cars to be loaded and unloaded by the owners of the property, it would be a breach of contract if the company were to unload, which would subject it to at least nominal damages. We do not think it material, as affecting the right to make a charge of this character, that the goods remain in cars instead of being put into a warehouse. It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them. (Hutchinson Carriers, sec. 378; Southwestern R. Co. vs. Felder, 46 Ga. 433.) And we think where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may in many cases be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business where he may unload it himself, or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier and the goods stored elsewhere at the customer's expense. And if a customer whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car, by requesting or permitting the carrier to continue holding it unloaded in his service and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no

compensation whatever shall be charged for such extra service.

It was contended by counsel for the plaintiff in error that "demurrage," which is the designation given to this charge by the rule in question, is allowed only in maritime law, and cannot be demanded by a railroad company in the absence of a stipulation therefor in the bill of lading. And in support of this view the cases of Chicago & N. W. Ry. Co. vs. Jenkins, 103 Ill., 588, and Burlington & M. R. Co. vs. Chicago Lumber Co., 15 Neb., 391, are cited. In the former of these cases it is said: "The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by sea-going vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not; and it is seen that these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers." The decision in the Nebraska case does not go into any discussion of the question, but merely cites and follows the holding of the Illinois court. In our opinion the reasoning above quoted is inconclusive. We see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles, as well as carriers by sea. What we have already said, we think, is a sufficient answer to the reason assigned, that railroads have warehouses in which to store freights. And the reason that "railroads discharge cargoes carried by them" and "carriers by ship do not but it is done by the consignee," of course cannot operate as to the cases provided for by this rule, which by its terms applies only where the unloading is to be done by the owners of the property. Nor is it settled that the right to demurrage in maritime law exists only by express contract. In this

country the courts have repeatedly declined to follow the rulings of the English common law courts on this subject, and have held that the ship owner has a lien upon the cargo for demurrage, notwithstanding the absence of any stipulation therefor in the bill of lading. (5 Am. & Eng. Enc. of L., Tit. Demurrage, p. 546; Porter Bills of Lading, sec. 356. See also Huntley vs. Dows, 55 Barb., 310, and Hawgood vs. 1310 Tons of Coal, 21 Fed. Rep., 681, and cases there cited.)

But we are not controlled by the principles which govern as to demurrage under the maritime law. The adoption by the railroad company of the term "demurrage" as a designation for this charge, does not require us to resort to that law as a standard for testing the validity of the rule. We are to look to the real substance and effect of the rule, rather than to analogies suggested by the technical designation which the carrier in this instance has seen fit to adopt. To hold that because the conditions of carriage by sea are different, no charge under this name can be enforced by a carrier by land, or that if allowed, it must be governed by the rules of the marine law, would be to adopt a narrow and merely technical view, ignoring well recognized grounds of public policy and the right of the carrier to prescribe reasonable rules and regulations for its own safety and the benefit of the public.

The instances are few in which regulations similar to the one in question have been passed upon by the courts. The only cases we have found in which the right of a railroad company to make a charge of this kind is denied, are the ones above referred to. On the other hand, the right is sustained by the Supreme Court of Massachusetts. (Miller vs. Mansfield, 112 Mass., 260.) See also a full and able discussion of the question by Toney, J., of the Law and Equity Court of Louisville, Kentucky, in a decision which has appeared since the judgment in the present case was announced. (Kentucky Wagon Mfg. Co. vs. Louisville & Nashville R. Co., 11 Rwy. & Corp. Law Jour., 49.)

2. We cannot as matter of law say that the rate of $1 per day for each car is unreasonable. It is not necessarily unreasonable because the cars vary in capacity, nor because a part of a day is charged for as a whole day. Nor can we hold that the customary rates for storage in ware-

houses and elevators must be the measure of compensation where the storage is in cars on the tracks of a railroad. Indeed, if it be a legitimate object of this rule to prevent the diversion of cars from the work of carriage, it would seem but proper that the charge for their use when detained as a means of storage, should not be such as to encourage customers to adopt that means instead of the more regular and usual methods. Moreover, there was no evidence to show that the rate fixed by this rule was higher than those customary for storage of other kinds. On the contrary, there was evidence tending to show that storage in the car, at the rate fixed by the rule, might be much less expensive than storage elsewhere, the general manager of the railroad company testifying that the modern car carries from 50,000 to 60,000 pounds, and that storage in a company's depot of a car load of 50,000 pounds would amount to $1.25 per day. He testified further: "The rate of $1 per day does not compensate us for the detention of the cars, and it was simply to induce the shipper to unload that the rule was passed."

3. That the rule was promulgated by a person or board of persons representing a combination of carriers, did not impair its effect as a regulation of this particular company. A common carrier though a corporation, makes a regulation its own by adopting it and acting upon it irrespective of the source from whence it is derived.

4. Where a regulation of this character is known to the customer before the contract for transportation is made, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted with reference to it (Miller vs. Mansfield, supra,) and it is operative whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor with the customary direction to notify the customer, or directly to the customer himself.

5. The plaintiff's mode of delivery of the cars to the defendants was to place them on a certain track "designated as belonging to the Augusta & Summerville Railroad" and known as "track 38;" from which point they went "into the possession of the Central Railroad," upon whose side track in another part of the city, the defendants' place of business was situated. Cars were not deliv-

ered on track 38 until the freight was paid and the bill of lading surrendered. Until then they were inaccessible for unloading, being kept elsewhere in the plaintiff's yard. After payment of the freight, the defendant could at any time have his cars moved where they would be accessible, but sometimes it would take from one to five hours after the freight was paid before they could be placed at the point of delivery. It was contended that the time thus required for placing the cars in position should not be included in computing the time which should run against the defendants under the rule in question, the rule containing this language, to wit: "It being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that when the period of such demurrage charges commences, they are to remain accessible to the consignee for unloading purposes." Certain instructions of the court on this subject and the refusal to charge thereon as requested by the defendants, were the basis of several assignments of error, which will be found set out in the reporter's statement. Taking the whole charge, in connection with the evidence, we think the law applicable to this part of the case was fairly presented. The court, having instructed the jury, in substance, that if the defendant had notice of this rule or regulation, and the goods were shipped under a contract that they were to be unloaded by the consignees, and the plaintiff notified the consignees of the arrival of the car and of its readiness to deliver the goods, and the consignees did not receive and unload them within the time stipulated by the rule, the defendants would be liable for the charge fixed by the rule for the detention of cars, added the following: "The railroad will have complied with that rule and regulation if you find from the testimony that it placed these cars at a point where they were accessible to the consignees, and allowed them to remain there during the time fixed by the railroad when they would be free from demurrage, or where it gave notice that it was ready to place them in such position. The mere giving notice, if there was evidence that it was not ready to place them in that position, would not avail, but if you find that the cars were in a position where they could be placed in an accessible place, and the road offered to place them, by sending notice that it was ready, then that would be a substantial

compliance with the rule and regulation. But if the consignees elected to delay and not receive them, they would be liable for the charges under the rule." Also: "If you are satisfied from the testimony that the cars, up to the time of actual delivery or taking possession, were inaccessible, that the railroad could not comply with its offer and that the delay was not the fault of the defendants, then no demurrage under this rule could be enforced, and your verdict would be for the defendants." We think the instructions complained of, as to substantial compliance with the rule, read in connection with the instructions above quoted, give a reasonable and proper interpretation of that part of the rule which relates to delivery at a point accessible to the consignee. In construing its phraseology, the course and exigencies of business are necessarily to be regarded, and hence, the cars, after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible if the carrier is always ready to render them so within the shortest practicable time, not longer than a few hours, after being notified that the customer is ready to unload. There is no evidence in the record that the cars were not at all times accessible, in this sense, or that there was any undue or unnecessary delay in placing them in position for unloading, after notice from the defendants that they were ready to receive them.

6. The evidence is sufficient to uphold the verdict.

Judgment affirmed.

Clerk's Office, Supreme Court of Georgia,

Atlanta, Ga., June 16, 1892.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the Supreme Court of Georgia in the case therein stated.

Witness my signature and the seal of said Court hereto affixed, the day and year above written.

[Seal.] Z. D. HARRISON, Clerk.

LAW AND EQUITY COURT, LOUISVILLE, KENTUCKY, NOVEMBER, 1891.

NO. 4103.

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11 RWY. & CORP. LAW JOUR. 49.
50 AM. AND ENG. CASES, 90.
98 KY., 152.

KENTUCKY WAGON MFG. CO.

VS.

LOUISVILLE & NASHVILLE R. R. CO.

OPINION OF HON. STERLING B. TONEY, JUDGE.

The Kentucky Wagon Mfg. Co. is a concern of Louisville owning their own side tracks, employing on an average of four hundred men per day and receives from fifteen hundred to two thousand car loads of freight per year. Refusing to pay demurrage the L. & N. R. R. Co. refused to deliver to them any loaded cars, hence this suit to enjoin the L. & N. R. R. Co. from refusing in the future to deliver cars of freight to them on account of non-compliance with the rules of the Demurrage Association.

The plaintiff urges six grounds of impeachment of the demurrage rules to prove that they are unreasonable and therefore not binding on it, to wit:—

1st. That the period of forty-eight hours within which it is required to unload said cars is arbitrary and unreasonable.

2d. That the charge of one dollar per day per car for the detention of cars after the expiration of said forty-eight hours is excessive.

3d. That neither the plaintiff or any other shipper or consignee was consulted by the defendants in the framing of said rules.

4th. That there is no reciprocity of indemnity in said rules in favor of plaintiff for not promptly furnishing and delivering cars.

5th. That the defendants, by entering into the Demurrage Association, have surrendered their corporate autonomy and functions, and have thereby agreed to abolish competition, and that for this reason the said rules are illegal.

6th. That under the demurrage rules a delivering road may make demurrage charges on cars that do not belong to it but to other companies.

BY THE COURT.

1st. From the testimony and of the action of the various Railroad Commissioners and of the decision of Judge Pryor (of the Court of Appeals, State of Kentucky), upon the testimony, the Court feels warranted in holding that the time fixed by the Demurrage Association for unloading cars is not unreasonable, and no one consignee has the right to advance the peculiar, rare and exceptional circumstances of his peculiar case to justify his violation of the rule.

2d. The life of the railroads is in their rolling stock, and it seems to the Court, upon the proof to be incontestibly established, that the demurrage charge of a dollar a day for the detention of cars is extremely reasonable.

3d. It is not perceived in what manner or upon what principle the reasonableness of the rules or regulations complained of can be affected, from the fact that the plaintiff was not consulted in framing the said rules.

4th. In making necessary and reasonable rules and regulations to control the traffic business of railroads in their dealings with shippers and consignees, it is difficult to understand how a rule or regulation, which is itself reasonable and essential to the proper conduct of the business,

can be assailed as unreasonable because there are not self-imposed penalties upon the carriers contained in said rules for possible delinquencies on their part.

If the regulation be reasonable the shipper is bound by it and that is all there is in it.

5th. What the Demurrage Association demands is simply the legitimate use of the cars and service of the track upon which the cars are operated. It is not organized in antagonism to legitimate competition.

6th. Each company uses the cars of the other roads which come upon its tracks, while in its possession, just as it does its own, and in point of law and in point of facts is the special owner and bailee of such car or cars until it returns them.

We find that none of the six objections urged by the plaintiff are sustained, either by evidence or by any known principle of law applicable thereto. But the plaintiff insists that even conceding that the rules are reasonable, the defendants have no right to withhold loaded freight cars consigned to it upon a tender by it to said defendants of the specific freight charges upon said cars. If the rules of the Demurrage Association are reasonable, the plaintiff ought to comply with them. The plaintiff wrongfully refusing compliance with the defendant's reasonable rules is the cause of the latter refusing to switch cars, and the plaintiff is therefore not entitled to equitable relief. Refusing to do equity, it cannot claim equity. The plaintiff's is the greater wrong and is not entitled to an injunction, therefore, let judgment be entered accordingly.

THE KENTUCKY COURT OF APPEALS.
OCTOBER, 1895.

97 KY.—32 S. W. R. 595.

THE KENTUCKY WAGON MANUFACTURING CO., APPELLANT,

VS.

THE OHIO & MISSISSIPPI RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE LOUISVILLE LAW AND EQUITY COURT.

ABSTRACT OF OPINION.

First—There may be a reasonable charge by a common carrier for the detention of its cars by the consignee or consignor beyond a reasonable time in which to load and unload them, and such charges may be imposed and enforced through what are known as car service associations, two or more carriers having the right to combine in that way and promulgate and enforce reasonable rules and regulations for the accomplishment of the desired object, all having the right to do jointly what each might do separately.

Second--Whether a charge of one dollar per day or fraction thereof made for detention of cars and use of track on cars not unloaded within forty-eight hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within forty-eight hours after being placed, is a reasonable charge, and the time fixed for loading and unloading is a reasonable time, are questions of fact, and on these issues in this case, the preponderance of the proof is with the carriers. And it is no objection to such a rule

that no exception is made in behalf of the shipper by reason of an unfavorable condition of the weather, as the rule must in the first instance allow time enough to meet all cases likely to arise, which is shown to be the case here.

Third—If the rules of such an association are reasonable, the fact that the shipper was not consulted in framing them does not vitiate them. Nor can the shipper complain that no counter penalties are provided, the carrier being accountable under well established legal principles for any dereliction of duty.

Fourth—The rule fixing a uniform charge for the detention of cars does not violate the law preventing agreements among rival carriers not to compete with each other.

Fifth—The fact that under the car service rules the delivering road is authorized to collect storage charges on cars received from connecting lines affords no ground of complaint to the shipper, the company having the right under the universal practice among carriers to use and control such cars as its own property.

Sixth—While common carriers, members of a car service association, have no right to refuse to receive freight from, or switch cars for a shipper because he owes to them or to other members of the association car service fees which he refuses to pay, or because he and other shippers have combined to resist the enforcement of the reasonable rules of the association, yet a shipper thus in default cannot ask the aid of a Chancellor to compel the carrier to do that which it admits it is its duty to do, and which it is willing to do upon a compliance on the shipper's part with the reasonable rules of the association. The shipper having done the first wrong and this caused the wrong-doing of the carrier, the Chancellor may refuse to hear him. And especially so, when as in this case, the delivery of the specific cars withheld by the carrier was accomplished by the issual of a mandatory injunction when the petition was filed.

Seventh—If upon any particular shipment storage charges have accumulated before it is unloaded by the consignee, and it is still in the car of the carrier, it may be retained until the regulation is complied with and the charges paid.

OPINION OF THE COURT DELIVERED BY JUDGE HAZELRIGG.

The Kentucky Wagon Company is a corporation extensively engaged at South Louisville in the business of manufacturing and selling wagons. Its works are located near the junction of the tracks of the Louisville & Nashville and the Louisville Southern Railroad Companies, and upon its yards it has its own switches and side-tracks connecting with each of these roads and with these roads alone.

It receives its materials in car load lots, and sends out much of the finished product in the same way. These railroad companies, the one or the other, have physical connection with every other railroad entering the city of Louisville, and are under contract with the Wagon Company for a stipulated consideration to deliver upon the side-tracks of the latter all loaded cars consigned to that Company over their own lines, or over their connecting lines; which cars when unloaded by the Wagon Company the carriers are to remove free of charge.

In February, 1890, the two roads named, together with the other railways entering the city of Louisville, conceiving that their patrons who handled these shipments in car load lots were unreasonably detaining the cars of the carriers, using them for storage purposes and otherwise materially impeding the service, formed what is known in the record as the Louisville Car Service Association; and through it at once promulgated certain rules and regulations calculated to remedy the evil, and ensure the prompt unloading of the consignments and consequent prompt return of the cars.

On the other hand the shippers conceding that the abuse complained of had in fact grown up not through their fault, and contending that the association of the carriers was illegal and wrongful, and the rules they were attempting to enforce, unreasonable and exorbitant, formed another association to resist their enforcement. The Company was a member of this organization and refused to conform to the rules of the Car Service Association, and the charges accumulating against it by

reason of its detention of cars, for more than 48 hours after delivery, the carriers refused to deliver freight consigned to it over their respective lines.

Whereupon in November, 1890, the Wagon Company brought this action in equity against some eleven of the railroad companies to restrain them from refusing to deliver to it on its side-tracks because of its non-compliance with the Car Service Rules certain designated car-loads of freight ready for delivery, and from so refusing in the future.

The original order which issued on the plaintiff's petition enjoined the defendants from further refusing to deliver to the plaintiff the carloads of freight held by them respectively, but thereafter in August, 1891, and after much of the proof had been taken the court so modified the order as to require the Wagon Company to return and redeliver to the railway companies the cars delivered by them, within the time prescribed by the Car Service rules; and such seems to have been the attitude of the parties upon the rendition of the final judgment herein, in December, 1891, when the Chancellor refused to grant the relief asked by the plaintiff, dissolved the injunction and dismissed the petition without costs.

The question to be determined at the threshold of our investigation of this case, is whether or not the rules and regulations of the associated defendants are reasonable and just, and such as the plaintiff ought to have regulated its business by.

Whether if reasonable, the carriers might enforce them by a combination or association, and whether however reasonable the rules may be, and however wrongful may have been the action of the defendants in resisting them, the carriers could lawfully refuse to deliver the freight consigned to the owners, are questions to be considered further along, as is the question whether conceding the refusal of the carriers to deliver the freight to have been wrongful, the plaintiff is in an attitude to ask the Chancellor to right the wrong by compelling an unconditional delivery of the cars to it.

The rules of the Association are of great length, and need not be recited in detail. A discussion of the grounds upon which the appellant seeks to impeach them will suf-

ficiently indicate their nature and purpose. Those grounds, as carefully grouped by the learned Chancellor, are as follows:

1st. That the period of 48 hours, which computed under the car service rules extends to near 60 hours, within which it is required to unload said cars after delivery, is too short.

2d. That the demurrage charge of a dollar per day per car for the detention of cars after the expiration of said 48 hours is exorbitant and excessive.

3d. That neither the plaintiff nor any other shipper or consignee was consulted by the defendants in the framing of said rules, and that neither it nor any other shipper or consignee has any voice in the selection and appointment of the manager or committee of the Car Service Association.

4th. That there is no reciprocity of indemnity and counter-penalty in said rules in favor of plaintiff and other shippers and consignees against the defendants for not promptly performing their duties as common carriers.

5th. That the defendants by entering into the Car Service Association have surrendered their corporate autonomy and functions, and relegated the control and management of their business as common carriers to the arbitrary control of the manager and committee of the Car Service Association, and have thereby agreed to abolish competition, and that for this reason the said rules are illegal.

6th. That under the Car Service rules a delivering railroad company is authorized to demand demurrage charges on cars that do not belong to it but to other companies.

That there may be a reasonable charge for the detention of the carrier's cars by the consignee or consignor beyond a reasonable time within which to load and unload them cannot now be doubted, and that such charges may be imposed and enforced through what are known over the country as Car Service Associations, is equally well settled.

A few cases only had arisen in the courts prior to the institution of this action, but several have since been considered, and we know of no exception to the general doc-

trine that reasonable rules involving charges for such detention may be promulgated by such associations, and that such organizations have universally been held to effect beneficial results in car service, alike to the shipper and to the carrier.

Whether a charge of one dollar per day, or fraction thereof, made for detention of cars and use of track, on cars not unloaded within 48 hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within 48 hours after being placed, is a reasonable charge, and the time fixed for the loading and unloading as required in the rule, is a reasonable time, are questions of fact, and on these issues the preponderance of the proof is clearly with the carriers. Such was the finding of the Chancellor at the hearing of the motion for a modification of the injunction and his conclusion at the final hearing; and such was the opinion of the Judge of this Court as to the reasonableness of the time for re-delivery when the case was heard on a motion to reinstate the injunction after its modification. Such indeed has been the determination of every tribunal where a similar provision has been adopted by the various car service associations of the country, nor has it been found objectionable to the courts because no exception is made in behalf of the shippers by reason of an unfavorable condition of the weather.

The rule to be beneficial to all alike must be of universal application and a rare or exceptional circumstance incident to a particular shipper at some particular time cannot be allowed to annul the rule. The rule must allow time enough to meet all cases likely to arise and that such is the case here is abundantly shown by the testimony.

That the rate of one dollar per day is also reasonable is conclusively shown. It may be somewhat more than the usual per cent. on the first cost of the car, but this is not the proper criterion.

A railroad company does not construct cars for the purpose of storing property in them, and their use for transportation involves the use of costly railway tracks and other expenditures. It may be true as contended that the shipper was not consulted in framing these rules. We think, however, if the rules are reasonable, this fact does not vitiate them. No complaint is made that there was an attempt

to enforce them before ample notice had been given of their adoption. So, too, if the rules are reasonable, the fact there is no reciprocity of indemnity or counter penalties provided, cannot avail the appellant.

If there is any principle of law well understood by shippers, it is that for any dereliction of duty the common carrier may be held accountable. Nor do we think the roads surrendered their corporate autonomy and functions by relegating the control and management of their affairs to the control of the Association. If the rules may be enforced by the respective carriers in their separate capacities, they may be enforced by them jointly. In the executive committee of this voluntary association, each road has its representative, and the rules adopted by the association are accepted by the carriers and become their own rules. What the carriers may each do for themselves, they do by a common agent.

This practice is common when Union Depots are under the control of a common agent of all the roads using the Depot. It is true that the rule involves the agreement of the roads to make their charges uniform, and this is supposed by counsel to be in violation of the law preventing agreements among rival carriers not to compete with each other.

We do not regard the principle contended for as applicable to this case. Manifestly the object of the rule fixing a uniform charge for the detention of cars, is not for the purpose of raising revenue at all. That feature is insignificant, the purpose being to facilitate transportation, and the less revenue there is derived from the enforcement of the charge, the greater the carriers are benefitted and their facilities increased for serving the public. The agreement in this case to fix a uniform rate is an advantage and not an injury to the appellant and its associates.

It is said, further, that under the car service rules the delivering road is authorized to collect storage charges on cars that do not belong to it but to other companies. This if true would seem to be material to the appellant, but it is only true in a qualified sense. The universal practice among carriers is, that instead of the railroad company which first handles the shipment unloading it at its terminal point, thus necessitating a transfer to a connecting line to

be forwarded to its destination, the cars containing the freight are delivered to the connecting line, and this line takes charge of, and uses and controls the car so received as its own property. It keeps it in repair while so using it as it does its own cars and under a mutual and universal custom, is entitled to all its earnings. Certainly no custom or regulation is more beneficial to shippers than this, for otherwise a transfer must be made at each terminal point of the carrier.

The assumption is that this interchange of cars will work out equal advantages to all, but to still further equalize the earnings, an account of the mileage is taken and the road using the car renders an account to the road in fact owning it, on the basis of three-quarters of a cent a mile so run.

We are convinced therefore that no valid objection can be urged against the enforcement of these rules of the appellees as announced through this Association. They not only commend themselves to the reason and common experience of those observant of such matters but as we have indicated they have found approval at the hands of a number of the courts of the country, and we may add of a number of State Boards of Railroad Commissioners whose business has been to carefully investigate such questions in behalf of the general business public. (See Miller & Co. vs. The Georgia R. R. Co., 88 Ga. 563, 18 L. R. A. 323. Miller vs. Mansfield, 112 Mass. 260. Chicago, Milwaukee & St. Paul Ry. Co. vs. Pioneer Land Co., 1892 Iowa. Beach Ry. Law Sec. 924. Union Pacific &c. R. R. vs. Cooke, Colo. 1892, 50 Am. & Eng. R. R. Cases 89.)

Admitting all this, the question remains: "Is the refusal of the appellant and its associates, even acting as they did under a combination to resist the enforcement of these reasonable rules, a legal excuse for the carrier's refusal to deliver freight cars on the appellant's side-tracks and switches?

If upon any particular shipment storage charges accumulated before it was unloaded by the consignee and it was still in the car of the carrier, we see no reason why it might not be retained until the regulation be complied with and the charges paid. The carrier undoubtedly has a lien on the freight while in his control and cannot be

compelled to surrender his security. But if he delivers the freight without collecting the car service fee, can it be said that he may refuse to do his duty as a common carrier and decline to deliver freight subsequently consigned?

If a passenger owe a former bill to the railway, can he be turned away when he tenders his ticket for the trip he is then about to take? The car service fees in this case were due only to two of the carriers and if the excuse offered were valid, the other appellees were without even that. The appellant owed them nothing.

But the plea is wholly insufficient as an excuse for any of the carriers. They occupy the same attitude and it is wholly immaterial whether they had or had not demands arising out of the failure of the appellant to pay the arrearages for car service. It was the duty of the roads not in connection with the appellant's yards to deliver the freight consigned to it to the roads which were in such connection, and the duty of these roads to receive it and deliver it to the appellant.

The right of the carriers to thus decline to switch cars for those who refuse to pay the bills for car service as defined in the rules of the association is made the basis of earnest argument by counsel for appellant, that such an unreasonable regulation itself affords ample excuse for the appellant's combination to resist the enforcement of the rules. But it is observable that the enforcement of this rule is made to depend on the refusal of the consignee to comply with the regulations.

The conditions upon which it may be put in force cannot exist except at the will of the shipper. He must first wrongfully refuse to comply with the rules, before any excuse is given the carrier to do the second wrong. And we think the appellant cannot complain of the wrong doing of the carrier made possible by his own wrongful refusal to comply with other reasonable regulations of the carriers.

And this brings us to a consideration of the question: Is the appellant in an attitude to ask the aid of a Chancellor to compel the carrier to do that which it admits is its duty to do, and which it is willing to do, upon a compliance on appellant's part with the reasonable rules of the Association?

Of the two wrong doers, we have seen that the appellant was the first. And upon ample authority, the Chancellor may refuse to hear him. Especially so, when the delivery of the specific cars withheld by the carriers was accomplished upon the issual of the mandatory injunction when the petition was filed. The carriers obeyed the order to deliver, so that no injury in that particular can accrue to the appellant by withholding the relief sought.

In Nash, &c., vs. Page, &c., 80 Ky., 539, the complainants who were tobacco buyers withdrew from the Board of Trade because the warehousemen, also members of the Board, were charging them too much. They resolved in a body not to buy from the warehousemen until the latter should accede to their demands. In doing this they acted in violation of the rules of the Board. The warehousemen, subsequently and illegally, refused them admittance to their rooms and the Chancellor was asked to compel such admission.

This Court said: "We have already adjudged that all have the right, upon payment of reasonable fees and charges, to enter these public warehouses, nor do we determine that such a right does not belong to the appellants; but while this right exists, it does not follow that the Chancellor will undertake to grant relief by injunction when the one party is as much in fault as the other." And the judgment below dismissing the petition was affirmed.

This cannot result as feared by counsel in putting the proper control and regulation of the business relations of these carriers with their patrons beyond the power of the courts or relegate the grievances of shippers to the mercy of the carrier. Doubtless the appellant has paid to these carriers bills of freight to the extent of thousands of dollars, and not a few of them inaccurate. If these inaccuracies and errors were not corrected and the carrier made to adjust them, it was certainly not because the courts were not open to its complaints. If the rules of the Association provide as they seem to do, an easy remedy for the settlement of conflicting claims among the parties interested, it is to be regarded only as an additional mode of adjusting these inevitable differences to the slower processes of the law. As suggested in the Nash-Page case, it may be expected that the personal and mutual interests of the parties in securing a prompt and satisfactory car

service so important to all will certainly lead them to a fair adjustment of their differences without the aid of the Chancellor. Judgment affirmed.

W. O. Harris, Humphrey & Davie, for Appellant.

Edmund F. Trabue, Pirtle & Trabue, Lyttleton Cooke, for Appellee.

DISTRICT COURT OF WOODBURY COUNTY, IOWA, AT SIOUX CITY, JANUARY, 1892.

BEACH RY. LAW., SEC. 924.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

VS.

PIONEER FUEL CO.

OPINION OF HON. JUDGE VAN WAGENEN.

The defendants, the Pioneer Fuel Co., denied the right of plaintiff to recover for the detention of cars. That no contract, expressed or implied, was ever made or existed between plaintiff and defendant in which defendant recog nized the right of plaintiff to charge and collect for detention of cars.

OPINION OF THE COURT.

We are not compelled to resort to the maritime law for well-established principles decisive of this case.

If the railroad's vehicles can thus be indefinitely tied up and converted into warehouses, it will take twice or three times the number of cars to accomplish the work of trans-

portation and increased trackage and terminal facilities in proportion. This would necessitate a large and unnecessary increase of the capital invested, and a corresponding increase of freight charges, and thus the rights of the public to an economical service would be violated. If the rule contended for by the defendants shall obtain, no reasonable man will expect the railroad company to provide the additional rolling stock and terminal facilities for nothing, and if the parties who render the same necessary, and who get the use of the cars and trackage, cannot be made to pay for the same, the general public will have to do so in increased freight rates. Such, however, is not the law.

We have been cited no case which clearly so decides, and it is so manifestly unjust and inequitable that we cannot believe it will obtain where the question is fairly presented.

When one person uses the property of another after being notified that a charge will be made for the same, the law implies a contract to pay a reasonable sum for such use. This is an elementary principle and one of every day application in the courts. Any other rule would be alike contrary to the fundamental principles of law and equity and repulsive to the commonest sense of right and justice. It is not the policy of the law to give something for nothing. It is the policy of the law to require a reasonable compensation for every valuable thing obtained or of which the complaining party has been deprived. Cases in which it has been held that the common carrier can make all necessary and reasonable rules for the speedy, safe and economical discharge of its important duties to the shipping public are too numerous to require citation. We can conceive of no more reasonable and necessary regulation than the one we are asked to enforce in this action. The need of such a regulation is apparent from the facts of this case.

The judgment will therefore be for the plaintiff in the sum of $90.00, the stipulated amount due.

DISTRICT COURT OF ARAPAHOE COUNTY, COL., MARCH, 1892.

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50 A. & E. R. R. CASES, 89.

THE UNION PACIFIC, DENVER & GULF RY. CO.

VS.

JOHN COOKE.

This suit was for $347.50 demurrage charges which had accrued on car loaded with brick consigned and delivered to the defendant at Denver.

Every possible question that could be raised was raised in this suit.

BY THE COURT.

1. That the railroad companies have the right to adopt and enforce any reasonable rule.

2. That the rule allowing 48 hours in which to unload is not unreasonable.

3. That $2.00 per car per day is a reasonable charge.

4. It is not perceived upon what principle the reasonableness of the rule can be affected from the fact that the defendant was not consulted in framing these rules.

5. The evidence shows that the regulation complained of was well known to the defendant before hand, and that it was immaterial whether the consignee had notice or not.

6. That the regulation is operative whether indicated upon bills of lading or not.

7. That it is not the duty of the railroad company to unload freight shipped in carload lots.

8. Whether or not this shipment was made by the consignor against the will and wish of the defendant is a

question that would be very material between the defendant and consignor, but does not affect this case.

The Court thereon ordered the jury to bring in a verdict for the plaintiff for the amount sued for, $347.50.

Hon. Amos J. Rising, Judge.

LAW AND EQUITY COURT, LOUISVILLE, KY.
JUNE, 1892.

UNREPORTED.

NEWPORT NEWS & MISS. VALLEY CO.
VS.
J. SCHWARTZWALDER & SON.

This was an ordinary action to recover car service charges for detention to cars beyond the time allowed for unloading.

It was tried before Judge Toney and a jury.

The jury returned a verdict for the plaintiff and the Court gave judgment for the full amount claimed, $128.00.

COMMON PLEAS COURT, LOUISVILLE, KY.
OPINION RENDERED JUNE 20, 1892.

UNREPORTED.

OHIO & MISSISSIPPI RY. CO.
VS.
PATRICK BANNON.

OPINION OF HON. EMMET FIELD, JUDGE.

In this case Mr. Bannon, the consignee, failed to unload the car within forty-eight hours allowed free, and

after demurrage had accrued the railway company had the shipment stored. Mr. Bannon soon afterwards replevined the consignment and the O. & M. Ry. Co. made answer claiming the demurrage charges, switching charges to the warehouse and storage charges, making a total of $27.00, for which the Court gave judgment.

In deciding this case the Court said that it seemed to him not only that the rules promulgated by the Louisville Demurrage Association were reasonable, but that he did not see how common carriers by railroad would ever have cars to furnish shippers without some such regulation to compel the unloading of them by consignees.

COURT OF COMMON PLEAS OF BUTLER COUNTY, PA., NO. 68, SEPT., 1892.

UNREPORTED.

PITTSBURG AND WESTERN RAILWAY COMPANY

VS.

W. J. GILLILAND.

Appeal by defendant from judgment of R. C. McAboy, Justice of the Peace.

This suit was brought to enforce the payment of $25.00 demurrage due the plaintiff company from the defendant for the detention to a car loaded with fertilizer, shipped to the defendant at Mars Station, on the railway of the plaintiff, in said county of Butler, Pennsylvania, from Carteret, New Jersey, which said car so loaded was under the rules and regulations of the Pittsburg Car Service Association, adopted by the plaintiff company, and of which the defendant had notice, to be by him unloaded within forty-eight hours next ensuing the delivery of said car on the side track of plaintiff's railway at said station,

for said purpose, or in default thereof to pay a charge of one dollar per day for the detention and use of said car for each and every day it should be permitted by the defendant to remain on said siding unloaded after the expiration of forty-eight hours, as aforesaid.

Which said car the said defendant would not and did not unload within said period of forty-eight hours next ensuing the delivery thereof on said siding, and notice to him to unload the same, but on the contrary unreasonably refused and neglected to unload said car for the period of twenty-seven days after the same was placed for unloading as aforesaid.

The defendant denied the right of the plaintiff company to charge and collect demurrage for the detention of said car because of his neglect and refusal to unload the same for the period of time charged in plaintiff's statement of claim. Alleged that the fertilizer company from whom he ordered said fertilizer shipped it one month too soon, that he did not have a place to store it conveniently, that it was not convenient for him to have it delivered before April 1st, 1892, and claimed that if the plaintiff company had any right to charge and collect demurrage for the detention of said car, it must look to the consignor therefor, as under his contract with the consignor he was not obliged to accept said fertilizer before April 1st, 1892.

January 9th, 1893, jury sworn.

Plaintiff's Counsel admits:

That the defendant will testify that the fertilizer company from whom he ordered the same, by mistake shipped said fertilizer one month too soon, that the defendant did not have a place to store it conveniently, that it was not convenient for him to have it delivered before the first day of April, 1892, and that defendant gave plaintiff's agent the above reasons for not unloading said car sooner than it was unloaded.

Defendant's Counsel admits:

That the plaintiff company is a common carrier for hire and in its capacity as such carrier transported said car upon and over its railway to Mars Station, as charged in the narr filed.

That said plaintiff company had adopted the rules and regulations of the Pittsburg Car Service Association with reference to the time in which cars should be unloaded by consignees or in default thereof, that a charge should be made of one dollar per day for each and every day any car shall be detained by reason of the neglect or failure of the consignee to unload the same. That said rule and regulation is reasonable and that the defendant had notice thereof as charged in the narr.

That he had notice of the arrival of said car at Mars Station and refused for the reasons aforesaid to unload the same for the period and time charged in the plaintiff's affidavit, and claim and narr, and that he has not paid the plaintiff said demurrage charge of $25.00 or any part thereof, and claims as a matter of law that said plaintiff is not entitled to charge or collect demurrage on cars thus detained.

Eo die under the facts agreed upon, the court directed a verdict in favor of the plaintiff for the sum of $26.12, being the amount which the defendant admits plaintiff is entitled to recover if under the law applicable to such cases the plaintiff is entitled to recover at all, with the right in the court to enter judgment for the defendant non obstante veredicto.

May 5, 1893, reserved question of law and rule for judgment on the verdict of the jury, argued.

R. P. SCOTT, Counsel for Plaintiff.

A charge reasonable in amount made by a railroad company for the detention of cars beyond a reasonable time after arrival and notice given to consignees, such detention being by the negligence or delay of the consignee is lawful and may be collected by the carrying company.

Alabama Railroad Commission in re petition of Youngblood & Ehrman.

No reason is perceived in law or justice why any unreasonable and unnecessary detention of cars by consignees should not be paid for. It does not follow that because there is no statutory regulation of the question, there is no law.

Union Brewing Co., Peoria, vs. the C. B. & Q. R. R. Co. (Phillips Commissioner, etc.)

Railroad companies have the implied authority as incident to their corporate character and purpose, to make and enforce all reasonable rules and regulations for the transacting and conducting of their business which in their judgment may be necessary for the successful, convenient and safe conduct thereof.

Their business implies a degree of authority almost absolute in the management, conducting and controlling of their trains and the persons thereon, as necessary for the common safety, and to protect themselves from imposition and wrong. Rohrer on Railroads, Vol. 1, page 227.

And this extends not only to passengers, but also to the making of like reasonable rules as to the reception and delivery of freight, such rules and regulations, passengers, shippers and consignees are to conform to.

Illinois Central R. R. Co. vs. Whitmore, 43 Ill., 420.

Tracy vs. N. Y. & H. R. R. Co., 9 Bosw., 396.

It is the duty of the consignee to be in readiness to receive his goods after proper notice and he will be liable to the carrier for compensation for any detention which may be caused by his fault in not promptly accepting them after he gets notice that the carrier is prepared to deliver them; and this not upon the ground that there is any contract or stipulation beween the parties as to the charge, but the principle is general that the carrier who has been improperly detained by the freightor or consignee of the cargo, can receive from him such damages in the nature of demurrage as will afford him a fair compensation for the loss sustained by the delay; as where the consignee of a cargo of grain instead of at once accepting it from the vessel which was ready to deliver it or providing a place for its delivery kept the vessel waiting for several days in order to sell it before delivery, it was held that he was liable for the loss occasioned by the detention.

Huntley vs. Dows, 55 Barb. 310.

Hutchinson on Carriers, page 383.

Railroad Company may make and enforce a reasonable regulation to prevent detention of cars. It is a reasonable regulation to charge a reasonable rate for demurrage and storage, and the payment of such reasonable rate or charge may be enforced.

Miller & Co. vs. The Georgia Railroad Co., Supreme Court of Georgia.

Kentucky Wagon Co. vs. The Louisville & Nashville R. R. Co., Louisville (Ky.) Law and Equity Court.

The Union Pacific, Denver and Gulf Ry. Co. vs. Cooke, District Court, Arapahoe Co., Colorado.

Ohio & Mississippi Ry. Co. vs. Bannon, Common Pleas Court, Louisville, Ky.

Milwaukee, Lake Shore & Western Ry. Co. vs. Lynch, Circuit Court, Oneida Co., Wisconsin.

Chicago, Milwaukee & St. Paul Ry. Co. vs. Pioneer Fuel Co., District Court, Woodbury Co., Iowa.

And not only are charges of this character collectible, but the Railroad Company has a lien on the goods for the same.

Miller vs. Mansfield, 112 Mass., 260.

George Campbell Co. vs. The Baltimore & Ohio R. R. Co., Circuit Court, Jefferson Co., W. Va.

J. D. MARSHALL, Attorney for Defendant.

June 5th, 1893. Opinion of the Court delivered by Hazen, President Judge.

OPINION.

Question.—Under the facts agreed upon the Court directed a verdict in favor of the plaintiff for the sum of $26.12, being the amount which defendant admits plaintiff is entitled to recover if under the law applicable to such cases the plaintiff is entitled to recover, with the right in the Court to enter judgment for defendant if the law is with him, non obstante veredicto.

Facts admitted:

Plaintiff admits inter alia that defendant will testify that the Fertilizer Company from whom he ordered the fertilizer, shipped it one month too soon and that he did not have a place to store it conveniently and that it was not convenient for him to have it delivered before the first day of April following its arrival at the station, as agreed upon with the Fertilizer Company, and that he gave plaintiff's agent the above reason for not unloading the car sooner than it was unloaded.

Defendant admits:

That the plaintiff company is a common carrier for hire, and in its capacity as such carrier, transported said car of fertilizer upon and over its railway to Mars Station, as charged in the narr filed. That plaintiff has adopted the rules and regulations of the Pittsburg Car Service Association, with reference to the time in which cars should be unloaded by consignees, or in default thereof that a charge should be made of one dollar for each and every day, per car, but no car shall be detained by reason of the neglect or failure of the consignee to unload the same for a longer period than forty-eight hours. That said rule and regulation is reasonable and that defendant had notice thereof as charged in the narr. That defendant had notice of the arrival of said car at Mars Station, and refused for the reason above (in plaintiff's admissions) to unload the same for the period and time charged in the plaintiff's affidavit and claim and narr., and that he has not paid the plaintiff said demurrage charge of $25 or any part thereof, and claims as a matter of law that plaintiff is not entitled to charge or collect demurrage on cars thus detained. That defendant ordered a car of fertilizer from Carteret, N. J. That this suit is brought to enforce the payment of $25 demurrage charges due plaintiff from defendant for the detention of a car loaded with fertilizer, shipped to the defendant at Mars Station, on the said railway of plaintiff company, in said county, from Carteret, N. J., by his order, which said car the defendant admits he had notice, under the rules and regulations adopted by plaintiff company, was to be by him unloaded within forty-eight hours next ensuing the delivery of said car on the side track on plaintiff's railway at said Mars Station, for

said purpose, or in default thereof to pay a demurrage charge of one dollar per day per car for the detention and use of said car and siding for each and every day the car shall be permitted by defendant, the consignee, to remain after delivery and notice, on said siding unloaded, after the expiration of forty-eight hours, as aforesaid.

That defendant would not and did not unload the goods from said car within a period of forty-eight hours next ensuing the delivery thereof on said siding, and notice to him to unload the same, but on the contrary unreasonably refused and neglected to unload said goods from said car for the period of twenty-seven days then next ensuing after the same was properly placed for unloading on the side track of plaintiff's railway at Mars Station, and notice of such delivery thereof. That said car, numbered 5,301, Pittsburg, Fort Wayne & Chicago, arrived and was properly placed upon the side track of plaintiff's railway, at said station, with notice thereof to defendant on March 9th, 1892, and was not unloaded until April 9th, 1892, being twenty-five days exclusive of forty-eight hours and Sundays (two days,) allowed the consignee under said car service rules, as applicable to this case, to wit, Article 4, Section 1: "That a charge of one dollar per car per day shall be made for detention to all cars and use of tracks at all points within the territory governed by this association, as hereinafter defined, after forty-eight hours from the time of delivery of cars on track for loading or unloading, not including Sundays or legal holidays, it being understood that collections be made and shall belong to each company for detentions on all side tracks directly connected with its line; a fraction of a day after forty-eight hours shall be considered a day."

Sec. 2. Each railroad company shall place upon its delivery tracks all cars containing freight to be delivered in that manner immediately upon arrival or as soon thereafter as ordinary routine of yard work will permit.

Sec. 3. Delivery of cars shall be considered to have been effected when such cars have been placed on recognized or designated delivery tracks.

Sec. 9. The territory covered by this association is

hereby defined as follows: To include all tracks within the distance of forty miles of the Pittsburg Court House."

That said Mars Station is within said radius. That plaintiff company having formulated its said rules governing its car service, which the defendant admits he had notice of and understood, and that the said rules were reasonable and necessary, he ordered the car of goods shipped over plaintiff's railway to Mars Station, within said district; that the car so loaded with his goods was so shipped by his consignor, though at an earlier date possibly than he desired, and when it arrived was properly delivered to him upon plaintiff's side track for unloading, he duly notified thereof, but refused to unload, save for the space of twenty-seven days and upwards thereafter. He assigned as a reason for his delay, that his consignor shipped his goods one month too soon, and that it was not convenient for him to have the fertilizer delivered before the first day of April next after its arrival, but there is no evidence that plaintiff company knew of this other than as stated, after the arrival of the loaded car. The plaintiff company, a common carrier for hire, neither knew of the private arrangement between consignor and consignee, nor was in any way a party to or interested therein, other than as a carrier for hire of said car load of fertilizer. The consignee, knowing the rules of the car service in this district, and admitting that they are reasonable and necessary for the accommodation of the public in shipping is bound by them through the implied contract growing out of this necessary relation in such cases.

Law.—It will not be denied that plaintiff company could have unloaded defendant's merchandise into its warehouse, and not only have collected storage charges, but have acquired a lien therefor as well as for the carriage of same. Then upon what theory can we distinguish the claim of storing in warehouse and in equally well constructed buildings on wheels. Upon the arrival of the fertilizer at its destination the liability of the plaintiff company as a common carrier ceased, but then became liable for the custody of the fertilizer as warehousemen. This claim or demand is in its essential character a charge for storage. Clearly the common carrier, after a reasonable time has been allowed for unloading, is as much en-

titled to charge for the further use of the car, and the track upon which it stands, as it would be for the use of its warehouse. This method of storage may in many cases be as effectual as any other, indeed it may serve the consignee's interest much better to have the goods remain in the car, at least for a time, than for him to unload them, and especially so where the goods are of an offensive character. Such was admittedly the fact in this case. Cases in which it has been held that the common carrier can make all necessary and reasonable rules for the secure, safe and economical discharge of its important duties to the shipping public, are too numerous to require citation.

We can conceive of no more necessary and reasonable regulation than the one we are asked to enforce; the need of such a regulation is apparent from the facts in this case, The rules adopted in this district are reasonable and clearly necessary, and in no way detrimental to shippers, but wholly in their interest. The common carrier is compelled to accept goods for transportation, and it would be manifestly unjust to not enforce a corresponding duty on the shipper, to not negligently and unnecessarily detain or otherwise deprive the common carrier of the use of the vehicles which the law thus places at his command.

Having reached this conclusion, judgment must be entered in this case in favor of plaintiff, and against the defendant upon this verdict, upon payment of the jury fee.

And now, June 5th, 1893, upon due consideration the Court being of opinion that the law is with the plaintiff in the question reserved in this case, and that judgment must be entered upon this verdict against defendant and in favor of plaintiff, upon payment of the jury fee. Judgment. By the Court,

AARON L. HAZEN,

President Judge.

CIRCUIT COURT, ONEIDA COUNTY, STATE OF WISCONSIN.

UNREPORTED.

OPINION RENDERED OCTOBER 15, 1892.

MILWAUKEE, LAKE SHORE & WESTERN RY. CO

VS.

A. F. LYNCH.

FOR PLAINTIFF BY JURY.

The plaintiff shipped one car load of lumber consigned to the defendant at Tomahawk Lake, Wis. The car was allowed to stand on the side track loaded until one dollar demurrage had accrued, when the defendant offered to pay the freight charges thereon and unload the car. The agent of the railroad company refused to allow the car to be unloaded until the demurrage charges were paid. The defendant refused to pay the charges, and the car remained on track nine days longer, when it was unloaded by the railroad company, and contents were taken by the defendant against the protest of the plaintiff.

The defendant made answer that the car was not properly placed for unloading, hence no demurrage was due, and set up a counter claim for $500.00 damages.

The jury decided that the car was properly placed for unloading.

The Court decided that the rule was a reasonable one, both as to the time allowed free to unload cars and as to the amount of the charge, and ordered judgment against the defandant for the amount sued for, twenty-two dollars and costs, making a total of one hundred and fifty-one ($151.00) dollars.

SIXTH DISTRICT COURT OF RHODE ISLAND, AT PROVIDENCE.

(R. I.) 22, L. R. A., 532.

J. C. GOFF

VS.

OLD COLONY R. R. CO.

OPINION OF HON. JUDGE COOKE.

(Opinion Rendered January 19, 1893.)

The defendant refused to deliver to the plaintiff a car load of brick on which demurrage charges had accrued, until the said charges were paid or guaranteed. Suit was brought by the plaintiff against the Old Colony Railroad for damages of $100.00 for illegally (as plaintiff claimed) preventing him from unloading the car.

The Court affirmed the railroad company's right to hold freight for demurrage charges and gave judgment for the Old Colony Railroad Company.

CIRCUIT COURT OF JEFFERSON CO., W. VA. MARCH, 1893.

UNREPORTED.

GEORGE CAMPBELL CO.

VS.

BALTIMORE & OHIO RAILROAD CO.

Two cars of bark were received at B. & O. Station in Charlestown, W. Va., in the month of August, 1891, and

consignees were notified on arrival in the usual way. They neglected to call and pay freight charges and remove the lading until after the free time had expired, and were then told by the agent that $1.00 car service charge on each car had already accrued, which must be paid before delivery. This they refused to do; and in accordance with car service rules delivery was withheld for payment of charge. The cars remained on track until $69.00 charge had accrued upon each car; the railroad company then sold the bark for freight and car service charges, and suit was brought by plaintiff for damages in sum of $500.00. By agreement of both parties, a jury having been waived, the case was submitted to the judgment of the Court, and after hearing the evidence and argument of counsel, judgment was rendered in favor of the defendant for the sum of $14.88, being the difference between the value of the bark sold and the amount of freight and demurrage charges.

The Supreme Court affirmed Judge Faulkner's decision, the Court unanimously refusing to grant an appeal.

CIRCUIT COURT OF COOK CO., ILLINOIS.
NOVEMBER 10, 1893.

UNREPORTED.

THOMAS PURCELL, ET. AL.
VS.
PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Thomas Purcell & Bro. are coal dealers in the city of Chicago, and are accustomed to receive coal in car-load lots over the P., C. C. & St. L. Ry. In December, 1891, the railroad company refused to deliver certain cars of coal which were then in its possession and upon which car service charges had accrued owing to the delay on the part of

Thomas Purcell & Bro. to promptly unload same. Purcell & Bro. filed a bill in the Circuit Court asking for a mandatory injunction compelling the railroad company to deliver the cars of coal then held and others as received, and an injunction was granted upon the bill.

Messrs. Walker & Eddy, counsel for the railroad company, afterwards appeared in the case, filed answer and cross-bill, and upon reference of the case to Master in Chancery I. K. Boyesen, evidence was taken, and a hearing had upon bill and answer, cross-bill and answer, and upon the evidence taken.

Both in the pleadings and at the hearing the railroad company made no attempt to claim any lien on the freight for charges which had accrued upon prior shipments of freight, or for any sums due for the construction of a side track. The only claim made by counsel for the Car Service Association, was that the specific freight in the possession of the railroad company at the time of the filing of the bill should be held for the specific charges which had accrued upon that freight by reason of unreasonable delay on the part of complainants in receiving and unloading the cars, so that on the hearing before Master in Chancery Boyesen, and afterwards before Judge Horton, the only question in controversy was whether or not the railroad company had a lien upon freight for car service charges which had accrued upon that particular freight on account of unreasonable delay in receiving and unloading.

Master in Chancery Boyesen held that the railroad company had a lien upon the freight in question under the published notices, rules and regulations, and provisions in the bills of lading, all of which provided that freight shipped should be subject to car service or demurrage charges at the point of destination, and, after a careful and equitable computation, he found that the sum of $40.00 was due the railroad company for car service charges.

On the hearing before Judge Horton, on exceptions to the Master's report, the case was exhaustively argued by counsel on both sides, and taken under advisement by the Court.

November 10th the Court rendered its decision, which is given at length. It holds broadly that railroad com-

panies have a lien upon freight for reasonable car service charges after a reasonable time has elapsed for the unloading and release of the cars.

Only one case has ever been passed upon by a court of record in this State prior to this decision by Judge Horton and that was the case of Jenkins vs. The Northwestern Railway Company, which went to the Supreme Court and was decided by that Court, and the decision reported in 103 Ill., page 588.

In that case the freight involved was paper, part of which had been unloaded before the railroad company claimed to hold the balance. The Supreme Court used rather sweeping language as to the right of railroad companies to hold freight for "demurrage."

It will be observed from Judge Horton's opinion that he does not question in any way the language or the decision of the Supreme Court as applied to the facts in the Jenkins' case, but he clearly distinguishes the Purcell case from the Jenkins' case, and clearly points out that the very language of the Supreme Court in the Jenkin's case impliedly gives railroad companies a lien upon such freight as coal, which cannot be practicably unloaded and stored, but must be delivered in bulk and unloaded by the consignee.

The decision is as follows:

DECISION BY JUDGE HORTON.

I have not prepared a written opinion in this case. While I have examined many of your authorities, I have not felt it necessary to review all these authorities in a written opinion. What I have to say, therefore, is more in the nature of my conclusions in the matter, with some references to the facts and the law.

The question as originally presented in this case by the bill Thomas Purcell filed originally was the right of the railroad company to hold his coal, claiming a lien thereon for charges on former shipments and for a claim of a balance due for construction of side track into his yard. An injunction was granted upon that bill, and that position has since been substantially abandoned by the present counsel in the case, and I think wisely abandoned.

for no court could sustain such a position, as claimed by the freight agent, I think it was, of the railway company —could not sustain it at all. The question, however, that has now been presented to the Court is this: The complainant is the receiver of large quantities of coal shipped in bulk, from Ohio, I believe it is—from out of the State. It is claimed on the part of the railway company that the defendant unnecessarily delayed the unloading of the cars, and that the railway company had a right to a car service charge or demurrage, or whatever you please to name it, for the use of these cars beyond a reasonable time for unloading, under the rules. The case was originally wisely brought, in my opinion, and would have been sustained upon the issue as originally presented.

There have been elaborate oral arguments and I have been furnished with very elaborate printed briefs in the case. The freight was coal in bulk. The complainant had a yard and side track connected by switches with the defendant railway company's tracks. The railway company was therefore bound by law in this State, and I think by a fair interpretation of the Constitution, by the Constitution of the State, not only to allow that switch connection to be made, but to deliver the coal in the yard of the defendant on the track, or, rather, deliver the cars loaded on the track. Were it not for the case of the Northwestern Railway Co. vs. Jenkins, 103 Ill., 588, this Court would have no serious trouble in this case. That case at first seems to be conclusive of the question now before the court. That case was decided upon an agreed statement of facts, and at my request I have been furnished with and have examined a copy of this agreement as filed in the Supreme Court which passed upon the case. When the facts in that case are examined and compared with the details of the case at bar, it will be seen that they differ materially. For instance, a sentence from their opinion, on page 600, the Supreme Court says: "But the mode of doing business by the two kinds of carriers is essentially different." That is, carriers by sea and carriers by rail, the opinion not recognizing, though not excluding, that carriage by water on our lakes is carriage by sea. "Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in

the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers."

It appears in the evidence, and perhaps the Court should take judicial cognizance of the fact, that the railway company has no warehouses for the storage of coal shipped in bulk. Another difference in facts is that the railroad company is required by law to deliver its coal into the complainant's yard. Again, it is the duty of the consignee to unload this coal the same as it is the duty of a consignee to unload a vessel. There is no demurrage as such, in a technical sense of demurrage, claimed in this case. There was no bill of lading accompanying the coal, but it was the custom, as between this railway company and this consignee and the consignor, to ship the coal without bills of lading. I do not know what the railway's custom is. They have some sort of checks or bills for the use of their conductors, and they are delivered with the goods.

In these essential facts and elements the case at bar differs from the case in the 103d—the Jenkins' case.

It is argued that the railway companies might impose great hardships upon shippers if allowed a lien upon freight for such reasonable charges as have accrued for the use of cars after reasonable time has elapsed for unloading, and indeed that might be so, and the argument impressed me with considerable force. But, on the other hand, if the railway company has the right to store freight, such as coal, upon the expiration of forty-eight hours, or whatever time is considered reasonable, they might run the cars out and store them on vacant property from which the cartage would be more than the coal is worth. That is, if railways were inclined to subject shippers to inconvenience, the opportunities would be quite as great under one method of doing business as under the other.

As remarked by the Supreme Court in the Jenkins' case, there can be no such lien except by contract or where it is allowed by law. There are many classes of cases where a lien is allowed, and where, without any specific contract to that effect, the law sustains it, such as innkeepers, agisters, carriers, bailees and warehousemen. Demurrage, as such technically, cannot be sustained, but the

right of lien is not limited here technically to the word demurrage, or to what may be defined demurrage. When the railway company placed the cars in the yard, the relation of common carrier ceased, it seems to me. When these cars were shunted onto the side track in the yards of the complainant, then the relation of common carrier ceased; but was not the railway company furnishing storage for this party? Substantially the same relation exists when cars were set upon a side track ready to be delivered and complainants did not receive them. It seems to me that the company, under such circumstances, would be sustained in so leaving the coal in cars, and considering the class of freight it is a proper place to store it. It would not be the proper place to store paper, such as was the subject-matter of the Jenkins' case, but it would be for bulk coal. Whether it be called demurrage, or car service, or whatever it may be, it seems that the company is entitled to a lien for proper charge. If they make an unreasonable charge, the plaintiff can make tender, replevin or pay under protest.

It is claimed that the railway company has the right to sue for the charge, whatever it might be. That is undoubtedly true, but in this case the proof shows that this coal is sometimes sold in car-load lots from one person to another, and passes through several hands while it remains on the cars of the company; that the complainants sell it in bulk and have the cars put into their yards and the purchaser takes the coal off the cars the purchaser doing the unloading and the complainants having nothing to do with it.

If the company is to look to the parties in a civil suit for the money, they have to sue as many parties as were owners of the coal while it remained on the cars. I do not think that a reasonable rule for the court to establish. The railways have no right to throttle a man as this company undertook to, according to the bill originally filed. They cannot hold freight in their possession for charges which have accrued upon freight delivered, or for other general indebtedness. That was the allegation of the bill as originally filed, but in the case as finally submitted to the Court, the question raised was as to the right of the company to hold freight for car service or storage charges which had accrued upon that particular freight. The

amount involved in the case is small, and the Court has not taken the time to exhaustively review the figures and accounts submitted in evidence, for I apprehend that it makes little difference to counsel whether the amount awarded be a few dollars more or less, for whether the claim be for one dollar or for forty dollars or more, the principle is the same, and it is the question of law which the Court must decide and which is of importance in the case. Therefore the finding of the master as to the amount due the railroad company is not disturbed.

So far as I have seen or examined the facts of the cases like the Jenkins' case, which hold that the railway company must unload and store, the freight involved was such as could be unloaded in warehouses. None of the cases applied to property such as coal, which cannot be readily and practically unloaded and stored.

Perhaps the proper order would be the dismissal of the bill for want of equity, but counsel may confer together and prepare an order in accordance with the opinion of the Court.

SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND.

90 VA., 393; 18 S. E. R., 516.
56 A. & E. R. R. CAS., 330.

JANUARY 11, 1894.

NORFOLK & WESTERN RAILROAD CO.

VS.

ADAMS, CLEMENT & CO.

OPINION OF THE COURT.

FAUNTLEROY, J.—The petition of the Norfolk & Western Railroad Co. complains of a judgment of the Cir-

cuit Court of Roanoke County, rendered therein at the April term, 1893, in favor of Adams, Clement & Co. against the said Norfolk & Western Railroad Co., for the sum of $488.00, with interest thereon from September 1, 1891, until paid, in which suit the said Adams, Clement & Co. are plaintiffs and the petitioner is defendant.

The suit is an action of assumpsit against the Norfolk & Western Railroad Co. to recover back certain sums of money alleged to have been illegally exacted from and paid by the said Adams, Clement & Co., lumber dealers, to the said Norfolk & Western Railroad Co. for car service or demurrage charges under car service rules, and a verdict was rendered and a judgment entered for the full amount of the plaintiff's claim. The case is here upon a writ of error obtained by the defendant company.

It is well settled, in this State and in other States, that a common carrier may make reasonable rules and regulations for the convenient transaction of business between itself and those dealing with it—either as passengers or as shippers. See Norfolk & Western Railroad Co. vs Wysor, 82 Va. (Hansbrough), 250; Norfolk & Western Railroad Co. vs. Irvine, 84 Va. (Hansbrough), 553. That this rule is reasonable and proper, and that the railroad company can make such a charge, has been decided in a number of States, the question never having arisen before in this State.

See Miller et. al. vs. Georgia Railroad & Banking Company, reported in American and English Railroad Cases, vol. 50, page 70.

Miller vs. Mansfield, 112 Mass., 260; Union Pacific, Denver & Gulf Railroad Company vs. Cooke, American and English Railroad Cases, vol. 50, page 89.

Kentucky Wagon Manufacturing Company vs. Louisville & Nashville Railroad Company, American and English Railroad Cases, vol. 50, page 90.

C., M. & St. Paul Railway Company vs. Pioneer Fuel Company, Beach Railway law, section 924, and cases there cited; Jones on Liens, section 284, and cases cited; Lawson's Rights and Remedies, vol. 4, page 3146, sections 1831 and 1832; Wood's Railway Laws, pages 1592, 1593 and 1600; Waterman on the Law of Corporations, vol. 2, pages 245 and 246; American and English Enc. of Law,

vol. 2, pages 878 to 881; and Notes: Redfield on the Law of Railways, 6th edition, pages 67 to 83.

In addition to this long line of authorities holding the right of a railroad company to make such charge, and the reasonableness of such charge, there have been numerous investigations and rulings upon the point by the railroad commissioners of the various States. In Texas the railroad commissioner, Judge Reagan, after full investigation, made an order fixing $3.00 per day, per car, as a reasonable charge for delay in unloading, after 48 hours' notice. The railroad commissioner of Illinois, and those of other States, after full investigation, have decided in favor of the right and reasonableness of such a charge; and when it is considered that these railroad commissioners are appointed for the express purpose of regulating railroads in the interest of the public, the weight of their decisions as to the reasonableness of such charge is apparent.

It is contended that the sections of the Code of Virginia, 1887, 1202 and 1203, make such a charge illegal, and the judge of the trial court took the view of the plaintiff, and instructed the jury that, under the law of Virginia, such charge is unlawful, whether it be reasonable or not.

We think that the trial court erred in so holding, and in so instructing the jury. The charge made by the railroad company for the detention of its cars, and the occupation of its track after due notice, is not a charge for transportation, storage or delivery of freight, and it is not a device or a pretext for exacting of the shipper or the consignee more than the rate prescribed by law and fixed by schedule; but it is for the use and occupation of the cars and the obstruction of their tracks by the consignee after the contract for transporting and delivering the freight had been fulfilled and ended. After arrival at the place of consignment, and notice to the consignee of the arrival, and the allowance of a reasonable time for the unloading of the cars by the consignee, according to his contract obligation to unload, the duties and the liabilities of the carrier cease, and the carrier becomes simply a bailee for hire, and can make reasonable rules and regulations and charges for such service as bailee as it may see fit. Such charges are not carrier charges in the meaning, intendment or prescription of the statute. Under the head

of carriers, the American and English Encyclopedia of Law, page 880, Vol. II: "A carrier fulfilling the duties of a warehouseman is not obliged to accept the goods subject to his ordinary liability. He may impose such terms as he pleases, and the consignor (consignee), with notice thereof, will be bound. Whether such terms are or are not reasonable, is an irrelevant inquiry."

In a note to this section is the following:

"We can see no reason why a railroad company as a common carrier cannot stipulate, by a contract express or implied, that their liability as carriers shall terminate with delivery at a particular point, and they will assume no liability at all in such case as warehousemen. If the consignee is fully advised, at the time of shipment, that the company has no agent at a particular station, or the place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do according to the reasonable and proper usages of his business."

Hutchinson on Carriers, section 378, says: "The custody and protection of the goods in his new character as warehouseman is a distinct service from that of their transportation, which entitles him to additional compensation, in consideration for which he continues liable for their safe keeping as the hired bailee of the owner."

The statute provides solely for the transportation, storage and delivery of freight to the carrier, to be shipped by it, and delivered at the other end of the journey to the consignee; but it makes no provision or regulation for the hiring of cars to be loaded and unloaded by the customer, according to such contract as the carrier and the customer may make, express or implied.

"A railroad company is not required by law to keep a warehouse or depot at every station along its route or line, and it may stipulate either expressly or by implica-

tion that it will assume no liability as warehouseman at a flag station where it has no depot or agent, and when the consignee is fully advised at the time of shipment, that the company has no depot or agent at such station, and it is not shown that the exigencies of its business required that it should have an agent at the place, the liability as common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman." It is shown in evidence that this rule and charge of one dollar a day for the unreasonable and even long-continued detention of the car, and obstruction of the tracks and business of the railroad, is not made for compensation to the company, but for the benefit of the public and a stimulus to the consignee to unload the car and disencumber the track and the business of the road. The evidence in the record is that the car is much more valuable to the company than the charge of $1.00 per day; and it is manifest that, if cars can be delayed and held by shippers or consignees for months (as the record shows was done in this case) without any regulation that would be operative, the business of the railroad and the public service must necessarily suffer. In view of the authorities and the facts of this case, we are of opinion the money paid by the plaintiffs to the defendant company was properly charged by the said company, and was due to it by the plaintiffs, Adams, Clement & Co., and that they had no right to recover it back; and that the Circuit Court of Roanoke County erred in the law as applicable to the facts of the case, and erred in refusing to set aside the verdict of the jury; that the judgment complained of is erroneous, and the same is reversed and annulled. And this court, proceeding to enter such judgment as the Circuit Court ought to have entered upon the pleadings, will dismiss the plaintiffs' suit.

Reversed.

SUPREME COURT, COUNTY OF CHENANGO, N. Y., MARCH, 1894.

UNREPORTED.

WARREN L. SCOTT

VS.

DELAWARE, LACKAWANNA AND WESTERN RY. CO.

This action was duly brought to trial at the above term of the Court before the Court without a jury, a jury trial having been waived in open Court, and the Court having heard the proofs and allegations of the respective parties, and David H. Knapp, Esq., of counsel for the plaintiff, and George W. Ray, of counsel for the defendant, and having duly considered the same and the arguments of said counsel, makes the following decision and finds and holds as follows:

FACTS.

I. At the times herein mentioned, the plaintiff, Warren L. Scott, was a dealer in lumber and resided at Norwich, Chenango Co., N. Y.

II. At the same times the defendant, The Delaware, Lackawanna & Western Railway Company, was a duly organized and incorporated railroad company, and common carrier of passengers and freight duly incorporated and organized under and pursuant to the laws of the State of Pennsylvania and owned and operated a railroad in the State of New York extending from Buffalo, N. Y., to Norwich aforesaid.

III. On or about the 5th day of October, 1893, the plaintiff purchased of Stewart Brothers at Buffalo, N. Y., a carload of pine lumber containing 13,871 feet, and same was shipped by said Stewart Brothers as consignors to said Warren L. Scott, the plaintiff, over its road and consigned to said Scott at Norwich, Chenango Co., N. Y.

IV. At the time the said lumber was shipped by the said Stewart Brothers as aforesaid the said consignors filled out three shipping bills or shipping receipts for said car of lumber to be signed by the defendant upon blanks furnished by the defendant, but kept by said Stewart Brothers at their office for the purpose, and which were dated at Buffalo Station, October 5, 1893, in which the consignee of said lumber was named as W. L. Scott, Norwich, N. Y., and the freight rate was fixed and the weight of the car specified when weighed. These shipping bills or receipts were delivered by Stewart Brothers, the consignor, to the defendant with the lumber which was sent from Buffalo Station to East Buffalo where the car was weighed on the 7th of October and then forwarded over the defendant's road to the consignee. The rate fixed in such shipping bills and receipts was 8¾ cents per 100 pounds and was a special rate. The said shipping bills or receipts contained, among other things, the following: Received from Stewart Bros., by the Delaware, Lackawanna & Western Railroad Company the property described below, marked, consigned and destined as indicated below, which said company agrees to carry to the said destination. It is mutually agreed in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained upon the face or back of this receipt, and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable. Upon all the conditions whether printed or written herein contained upon the face or back of this receipt, it is mutually agreed that the rate of freight from to is to be in cents per 100 lbs., if special, rate 8¾ cents.

Then followed the name of the consignee with place of destination and a description of the car by number with the weight of the car, and among the conditions so referred to were the following, printed upon said shipping receipts or shipping bills, viz.:

"5. Property not removed by the person or party entitled to receive it, within twenty-four hours after its ar-

rival at destination, may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for the detention of any car, and for use of track after the car has been held forty-eight hours for unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor. Property destined to or taken from a station at which there is no regularly appointed agent, shall be entirely at risk of owner when unloaded from cars, or until loaded into cars; and when received from or delivered on private or other sidings, shall be at owner's risk until the cars are attached to, and after they are detached from, trains."

"10. Owner or consignee shall pay freight at the rate below stated, and all other charges accruing on said property, before delivery, and according to weights as ascertained by any carrier hereunder; and if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the rates and under the rules provided for by published classifications."

These three shipping bills or shipping receipts when the car had been weighed and the weight inserted, were signed by W. C. Colwell who was the freight agent of the defendant at Buffalo, and the defendant retained one and the other two were immediately returned by mail to the consignor, said Stewart Brothers, and received by them duly signed as aforesaid.

Said Stewart Brothers were acquainted with the contents of said receipts and were accustomed to ship lumber over the defendant's road and to fill out the shipping bills or receipts to be signed and returned to them for freight shipped and were in the habit of having said shipping receipts and bills, when signed returned to them through the mail.

All the conditions above given were printed in and upon the form or blank in use by the defendant at all points, and the plaintiff had received freight over the de-

fendant's road, and sometimes had received the shipping bills and receipts for said freight, and had also shipped freight over the defendant's road at Norwich, N. Y., and had used and received from the defendant shipping bills and receipts for freight shipped by him over their road filled out upon the same forms or blanks and containing the same conditions.

V. The above shipping bills and receipts with the conditions above stated formed the contract between the consignors and the defendant, and the plaintiff and the defendant, for the transportation and delivery of said lumber, and was a valid and binding contract.

VI. The defendant was also a member of the Central New York Car Service Association, and the defendant had adopted the car service rules of said association, among which were the following:

"1. A charge of one dollar ($1.00) per car per day or fraction of a day shall be made for car service and use of track on all cars not unloaded within forty-eight (48) hours after arrival, not including Sundays or legal holidays, except as hereinafter provided.

"9. A full record shall be made of the arrival and disposition of all cars subject to car service rules, and the agent of each road shall make daily reports to the manager on such forms and in such manner as may be prescribed by him from time to time."

"10. On cars arriving after seven o'clock (7) a. m., car service will be charged after the expiration of forty-eight (48) hours from seven (7) a. m. following. On cars arriving after twelve (12) o'clock noon, car service will be charged after the expiration of forty-eight (48) hours from noon following."

"11. When cars are delayed after arrival beyond the time allowed by Rule 10, on account of failure of shipper or consignee to give prompt notice of disposition, the time so consumed shall be considered a part of the forty-eight (48) hours allowed for unloading."

"23. Car service charges shall be collected in the same manner and with the same regularity and promptness as

transportation charges, and agents will report to the manager of the association the name of any corporation, firm or individual refusing to pay the same."

"24. Property upon which car service charges have accrued shall be held by the road, and the consignee will not be allowed to remove the same from the company's premises, or from cars on its team tracks, until the charges that have accrued thereon are paid."

The substance of a part of such rules had been incorporated in the aforesaid conditions.

A short time prior to the shipping of the above specified lumber over the defendant's road, the plaintiff had received other lumber over the same road, and same having remained unloaded more than forty-eight hours after being placed for delivery, the defendant had claimed pay for car service and use of track on such car, and the existence of such rules and the amount of the charge made and claimed had been made known to the plaintiff who made no objection to the amount, but denied the defendant's right to make such a charge and his liability to pay, and he had refused to pay the amounts charged or anything for car service and use of track, or demurrage, as it was usually termed.

VII. The said carload of lumber so forwarded by Stewart Brothers to the plaintiff from East Buffalo on the 7th day of October, 1893, reached Norwich aforesaid on the morning of October 9, 1893, and was placed for delivery at one o'clock p. m. of the same day on the switch, and at a convenient place for unloading, and between 7 and 9 o'clock in the forenoon of the same day the defendant's agent notified the plaintiff or his agents and servants, at his place of business, in the usual manner, that the car had arrived and would be placed for delivery at noon of that day. On the 11th the defendant paid the freight on said carload of lumber.

VIII. Between the 11th and the 13th days of October the plaintiff removed a portion of said lumber, and on the afternoon of October 13th a portion of said lumber remained in said car and the plaintiff was engaged in unloading it, and 5,713 feet of lumber then remained in the car which was worth $42.50 per thousand.

IX. Under the said rules and regulations of the defendant charges for car service and use of track at one dollar per day commenced to accrue at 7 o'clock a. m. on the 12th day of October, and in the afternoon of the 13th day of October two dollars for car service and use of track on said car had accrued.

X. During the afternoon of October 13th the defendant by its agent, W. S. Wagner, who was the freight agent at Norwich, N. Y., made out and presented a bill to the plaintiff for such car service and use of track for two days, to wit: the 12th and 13th days of October, and presented the same to the said Warren L. Scott, the plaintiff, for payment. The plaintiff refused to pay said charges, whereupon the defendant, by its said agent, notified the said Scott that if he did not pay said charges he should close the car, and said Scott refused to pay said charges or any part or portion thereof, making no objections to the amount or to the reasonableness of the charge, whereupon the defendant, by its said agent, closed said car.

XI. At 7 o'clock on the morning of October 12 the said car of lumber had been held more than forty-eight hours for unloading, and the charge of two dollars for the detention of said car and use of track thereafter was a reasonable charge.

XII. The defendant asserted his lien therefor and gave due notice to the plaintiff thereof.

XIII. Thereafter and on the 27th day of October, 1893, the plaintiff commenced this action, claiming that the defendant had converted the lumber remaining in said car at the time it was closed as aforesaid.

And from the above facts I do find and hold as

CONCLUSIONS OF LAW.

I. That the above and aforesaid shipping bill and receipt or bill of lading formed and constituted a valid and binding contract between the said defendant, The Delaware, Lackawanna & Western Railway Company, and the said consignors, Stewart Bros., and the consignee and plaintiff, Warren L. Scott, as modified and limited as to

the placing of the car and the time demurrage on charge for car service and use of track should commence, and as to the amount of such charge, by the said rules and regulations of the defendant.

II. That such charge of one dollar per day for car service and use of track was a reasonable charge.

III. That the sum of two dollars had accrued due the defendant from the plaintiff for car service and use of track under said contract at the time defendant closed said car and refused to permit the plaintiff to remove the balance of said lumber unless such charge was paid, and the defendant had a lawful lien on said lumber therefor and the right to hold said lumber until such sum duly demanded was paid.

IV. That such lien was not waived by the defendant.

Note:—The question was raised, whether the railroad company waived its right to charge for car service and use of track, by accepting the freight charges and taking the consignee's receipt for the property.

The Court holds that this right was not waived, for the reason, that, to hold otherwise would permit a consignee to hold a car indefinitely, provided the charge for transportation was paid, and receipt given for the property.

V. The defendant rightfully detained said lumber and did not convert the same to its own use or at all.

VI. The plaintiff has not proved a cause of action.

VII. The defendant is entitled to a judgment dismissing the complaint of the plaintiff on the merits with costs.

Judgment is ordered and directed accordingly, to be entered by the clerk of the County of Chenango, N. Y.

CHARLES E. PARKER,
Justice of the Supreme Court.

COUNTY COURT WINNEBAGO COUNTY, WIS.,
MAY, 1894.

UNREPORTED.

CHICAGO & NORTHWESTERN RY. CO.

VS.

JOHN STRANGE PAPER CO.

Demand, $257.00.

Suit commenced April 3rd, 1893, both sides agreeing to have case tried before the Court without a jury.

May 31st, 1894, judgment entered in favor of plaintiff and against the defendant for full amount sued for.

COUNTY COURT, WINNEBAGO COUNTY, WIS.,
MAY, 1894.

UNREPORTED.

MILWAUKEE & NORTHERN R. R. CO.

VS.

JOHN STRANGE PAPER CO.

Demand, $596.00.

Suit commenced April 3rd, 1893, both sides agreeing to trial of case before the Court without a jury.

May 31st, 1894, judgment entered in favor of the plaintiff and against the defendant for full amount claimed.

The defendant did not dispute records of cars, nor question right of railroad companies to collect car service charges, but advanced a counter claim, based on alleged delays on the part of the railroad companies in placing cars.

The Court found:

1st. That the allegations of the plaintiff, as made, were true.

2nd. That the defendant withdrew the counter claim.

3rd. That defendant owed plaintiff the full amount sued for, and judgment for the plaintiff was entered accordingly.

COURT OF COMMON PLEAS, NO. 3, HAMILTON COUNTY, O., OCTOBER, 1894.

UNREPORTED.

DAWSON, BLACKMORE & CO., ET. AL.

VS.

C. C. C. & ST. L. R'Y. CO.

CHARGE BY HON. HOWARD B. HOLLISTER, JUDGE.

Gentlemen of the Jury:

This is an action brought by Dawson, Blackmore & Company, against the three C's & St. L. Railroad Company, commonly known as the "Big Four," for the recovery of eight dollars, which the plaintiff claims was extorted from it, or obtained from it against its protest, and in such a way that in order to obtain its property, it was compelled to pay, or go without the property.

It is claimed by the plaintiff that the eight dollars paid by it was paid under protest. A voluntary payment, made by one of a charge against him, can not be recovered back by him, except under a mistake of facts. There is no charge in this case that there was a mistake of facts. But a recovery may also be had where property to which the individual owning it is entitled is detained from him to pay any charge which has been illegally made against him by the person who has the property in charge, to which the plaintiff is entitled. But such payment must be made under circumstances showing that the intention was absolute, and that he could not obtain his property without the payment of the sum demanded. Under those circumstances, he may recover, if you find them to exist, the money so paid, back. And the testimony in this case on that subject is confined to the testimony of two witnesses, one on either side of the case. You will have to weigh the testimony as given by them between them, and you will observe in the weighing of that testimony, the rule which will pertain also to the other questions in the case, that the plaintiff must establish his case by a fair preponderance of the testimony. That is to say, that the weight of the testimony must be on his side of the case. It is not necessary that that weight shall be of any considerable amount. It is sufficient that it weigh down the scale.

If you find, under the rules I have given you, that there was no demand made upon the plaintiff for the payment of eight dollars, in the sense that without the payment, the property could not be obtained, then you will find for the defendant. The money in such case would have been paid voluntarily. If you find, however, that there was a demand for the payment, and as a condition preceding the delivery of the goods, the payment had to be made, from the statement of witnesses and the testimony in the case, then you will find that the payment was involuntary, and may be recovered, and you will find a verdict on that issue for the plaintiff. Even under the circumstances of the case, as the law will further be given to you, if it is a reasonable regulation, there could be no recovery.

It is the duty of a railroad Company, when freight is delivered for shipment, to deliver the bill of lading as it is called, to the shipper, and then to transmit the goods, within a reasonable time, to the place of destination. Any

information of the contents of a bill of lading that may have come to the shipper after the goods are shipped, has no binding force upon him; and if you find that before these goods were transmitted, that a bill of lading was delivered to the shipper of the goods, then I charge you that the contents, under the circumstances of the case, of the bill of lading, are chargeable to the shipper.

It is true that the law is general that any restrictions in bills of lading, concerning which there is not an express agreement, and which limit is what is known as the common law liability of a common carrier, of which a railroad is one, are not binding upon the shipper, unless they are brought to his notice, and he especially assents thereto.

And that involves the question whether or not a charge of the nature of the charge made by the testimony in this case is such a charge as was within the process of the law, as announced by the decisions which now go to make up the common law. There was a rule of common law whereby a common carrier by water might, after reaching the destination and notice to the consignee of the goods to remove the goods, charge a reasonable sum, after a reasonable time had elapsed within which the consignee had not removed goods. That reasonable sum was such sum as the vessel could fairly have earned during the time that the consignee neglected to take the goods away after notice that they were there, and after reasonable time to take them away. The principle applicable to those cases is applicable to the case of railroads; exactly the same. And if there is no decision in England on the subject, as announcing the common law, the practice of the common law is the same, and is, I charge you, applicable in the State of Ohio, to railway cases.

They have, after receiving the goods and taking them to the place of destination, a right, after giving the notice upon their arrival to the consignee, to charge a reasonable sum for demurrage, for storage, in the nature of demurrage, as explained to you. What that sum is, is an amount which the cars in which the grain is left, if it is grain in any given case, might have earned during such time as the consignee, after notice, and a reasonable time within which to remove, has permitted the cars to remain in the yards of the railroad company.

It is in evidence that the time of detention, the time of redemption, the time within which the consignee might take away goods, was forty-eight hours after arrival of the goods. It is in evidence that notice was sent to the consignee on the day of the arrival of the goods.

If you find from the testimony in this case that notice was sent to the consignee, which was Williamson, who was also the shipper, after the arrival of the goods, and within the first twelve hours or other reasonable time, leaving enough time within which the goods might have been removed by the consignee from the ground, then I charge you that the railroad company had given a reasonable notice of the arrival of the goods.

If you find that the custom, where the name of the consignee was not familiar to the railroad company, was to give notice to the Chamber of Commerce, and such notice was given within such reasonable time, as I have said, then I charge you that that notice is a good notice, and was all that was required of the railroad company.

But to go back; as I have said, the right then, that the Railroad Company had to charge this demurrage, was a common law right, and inasmuch as it was a common law right, the rule before stated, that an express assent on the part of the shipper to a clause in a bill of lading was necessary where a common law right was to be restricted; that in this case by the insertion of that clause in the bill of lading, that stipulation, to the effect that demurrage would be charged, was not an abridgment or a restriction of the common law right by the Railroad Company, and that under those circumstances it was not necessary that that special clause should be brought home to the notice of the shipper, and any especial agreement made or express agreement made with respect to it; that under those circumstances, the stipulation being in the bill of lading, if you find that the bill of lading as delivered before the car was shipped, did bring home notice to the shipper, and that he is bound by it. But he is bound by it without any special contract. And further, that when a shipper delivers to another to whom it may have been sold, the shipper and the consignee being the same, the bill of lading is delivered to the one to whom he has sold it, and the one to whom he has sold it is bound by the same conditions

he is, and is bound by the information contained in the bill of lading that there would be a reasonable charge for demurrage if after notice here at Cincinnati, the goods were not removed within a reasonable time. If you find that a notice, such as I have described, was sent out by the Railroad Company, to the consignee, here at Cincinnati, Williamson & Company, and that also within forty-eight hours that the cars could have been unloaded, the forty-eight hours also covered the time within which notice was given that the car could have been unloaded by the consignee before the expiration of that time, then I charge you that forty-eight hours is a reasonable time within which the car might have been unloaded by the consignee.

If you find from the testimony that the car could have earned more to the Railroad Company than a dollar a day, then the sum of one dollar, I charge you, was not an unreasonable sum to charge for that service.

There remains the important question, the right of an agent of the defendant to make a contract relative to notice of who was the owner of the goods shipped under the circumstances under which these goods were shipped. The ownership of goods of this kind shipped in this way, is indicated by the existence of the paper called the bill of lading. The delivery of the bill of lading by the one to another, carries with it the title to the property.

It is in evidence that the rule was, of the Railroad Company, and known to the trade generally dealing with Railroads, that notice was given of the ownership by the delivery of bills of lading, or upon written order of the owner to the Railroad Company to deliver to some one else. That regulation is a very reasonable one, growing out of the fact that the paper itself shows the title to the property, and its delivery carries with it the title. The mere say so of any individual that he is the owner of such property, is entirely ineffectual. It amounts to nothing. The Railroad could not act upon it in the delivery of the goods safely, because if they did, frequently opportunities would come for dishonest men to announce themselves as the owner of the property and receive it from the Railroad Company to its damage, because it would have to respond to the owner of the goods if they delivered them to some one who was not entitled to them.

It is also in evidence that on occasions, verbal notices were given to the Railroad Company that the property belonged to some one or other, and that those verbal notices were accurate. There is no rule more clearly established than that the principal is bound by the act of his agent acting within the scope of his authority. If you find that the agent of the defendant acted within the scope of his authority in receiving verbal notice, and that he did in fact receive a verbal notice, then such notice would be a notice to his principal, the Railroad Company.

Whether a notice of that sort was given in this case is the question for you to determine. If a notice merely came from Mr. Louden, that is to say, if Mr. Louden said that he was the owner of the goods, it would amount to nothing more than that he claimed to be the owner of the goods, and under those circumstances, the Railroad Company, through its agent, would not be bound by his statement. But if the owner of the goods, the shipper, with the individual to whom he has sold the goods, in other words, if Williamson and Louden went to Mr. Campbell, and expressly stated to him that Williamson had sold the goods to Dawson, Blackmore & Co., and Campbell knew that Louden was a member of the firm of Dawson, Blackmore & Co., and thereupon expressly agreed that he would waive what is the usual course in such cases, if you find that the usual course was to require the delivery of the bill of lading, or a written order, then, under those circumstances, I charge you that the Railroad Company had notice that Dawson, Blackmore & Co., were the owner of the goods. In that connection, you will bear in mind, if you find that the custom was to deliver bills of lading or written orders, that at the time that it was claimed by Williamson and Louden, that statements were made to Campbell to the effect that Louden and Dawson, Blackmore & Company, were the owner, had in their possession, or in the possession of one, or either of them, the bill of lading itself, if you so find the fact to be, which is the evidence and the best evidence of the passing of title from one to another; that fact will be considered by you in determining the probability of the claim that there was an express promise on the part of Campbell, in effect to receive notice for the Railroad Company, contrary to the usual custom of giving such notice by a bill of lading, or by written notice, if you find that that was the custom.

You will also bear in mind that the rules out of which the demurrage charge grew, adopted, as the testimony shows, in 1889, were known to the shipping public, to shippers and receivers of grain, at the City of Cincinnati; and if you find that they were known to the public and that they were known also to Dawson, Blackmore & Company, then the charge that there would be a charge for storage would be known to them from the time that the car arrived.

There is a dispute in the testimony as to when the time began from which the charge for storage or demurrage should be started. The testimony on the part of the superintendent is that such charge or the time for the expiration of which such charge shall begin, began at the arrival of the goods.

That is also testified to by Campbell and perhaps by others.

There is also testimony tending to show that the forty-eight hours began to run from the time that the grain was inspected. You will have to determine from the testimony which of those statements is correct and which is more likely to be correct, from the position and standing and occupation of the witnesses who have testified on the subject. The necessity for inspection is not devolved upon railroad companies. The testimony is uncontradicted. The railroad has nothing to do with it, and inspection is made by the Chamber of Commerce for the benefit of merchants, for the facilitation of business between merchants, by which samples of the articles bought and sold may be brought as early as possible to the Chamber for inspection by those who deal in such commodities.

As to the publication of lists of cars received by railroad companies, there is no requirement to publish such lists unless you find that the custom has grown up between them in their dealings with shippers of grain, to publish such lists, and that under those circumstances it would be their duty to continue their publication. But even under those circumstances, if you find from the testimony in this case, even if there was a custom generally, that that custom did not apply to the shipment of grain over the division of the railroad of the defendant from which this car came, then the question should be entirely left out in your consideration of the case.

The jury returned a verdict for the defendant.

LAW AND EQUITY COURT, RICHMOND, VA., MARCH, 1895.

UNREPORTED.

C. W. ANTRIM & SONS

VS.

RICHMOND, FREDERICKSBURG & POTOMAC R. R. CO.

ACTION OF DETINUE.

For 61 Bbls. Flour @ $2.25 per bbl.....	$137 25
And 80 Bbls. Flour @ $2.15 per bbl.....	172 00
Total	$309 25

Damages laid at $500.00.

The car of flour arrived at Richmond on the night of March 12th, consigned to order of David Stott, the shipper, without name of party to notify. On March 15th railroad company received for first time the information as to whom to deliver flour, viz.: C. W. Antrim & Sons.

On same day the railroad company notified Antrim & Sons of the arrival of the flour. This day was Friday. On Monday the 18th, (Saturday being half holiday) Antrim & Sons commenced hauling the flour from the car, and after hauling one load refused to pay one dollar car service charge, which they were told had accrued, whereupon the company refused to deliver the remaining quantity of flour. C. W. Antrim & Sons then brought an action of detinue against the R. F. & P. R. R. C., in the Law and Equity Court, as above set forth, to recover the flour and damages for its detention. The defendant company put in a special plea asserting their lien upon the flour for the one dollar, car service charge, and the Court allowed the instruction asked for by the defendant company. This instruction set forth the opinion of the Court, which is briefly this, viz.: that where goods are consigned

"to order" of consignor, or in such other way as does not enable the carrier receiving them to know who the consignee is, then the free time allwed consignees under the car service rules begins to run from the same time as in other cases, viz.: the arrival of the car, and not from the date of the receipt of notice of the name of consignee.

INSTRUCTIONS OF COURT IN CASE OF C. W. ANTRIM & SONS VS. R. F. & P. R. R. CO.

The Court instructs the jury that, if they believe from the evidence that the flour sued for in this case was received in Richmond, Va., by the R. F. & P. R. R. Co. on the night of 12th, or morning of 13th of March, and the company had no instructions or knowledge as to whom it was to be delivered to other than that contained in manifest until the 15th of March, on which day the plaintiffs were notified by the company, and that Antrim & Sons commenced hauling the flour from the company on the 18th day of March, and after hauling one load refused to pay one dollar charged by the said company for detention of car and occupation of track, then the said company had the right to decline to deliver flour until said charge was paid, and they should find for the defendant on the special plea in this case asserting a lien.

Verdict for defendant.

SUPERIOR COURT OF TIPPECANOE COUNTY, IND., APRIL, 1895.

UNREPORTED.

THE LAFAYETTE LUMBER & MFG. CO. VS. C. C. C. & ST. L. RY. CO.

An action in replevin.

In February, 1894, a car of lumber consigned to the LaFayette Lumber & Manufacturing Co. arrived at La-

Fayette, Ind., on the C. C. C. & St. L. Ry. This firm had repeatedly refused to pay car service charges. At the expiration of the free time, the car being but partly unloaded, a bill for car service due was presented, which they refused to pay. They were then told they could not have any more of the lumber until car service bill was paid, and that additional charges would be made at the rate of $1.00 per day until car was released.

At the expiration of two weeks the lumber company got a writ of replevin, under which lumber was delivered and unloaded with $17.00 due for car service.

The case went into court, and after several demurrers on the part of plaintiff to defendant's answers, which were overruled, came to trial.

Plaintiffs claimed discrimination against them in the car service rules which allowed an additional 48 hours in which to unload coal and coke, over and above the 48 hours allowed for unloading lumber; and inasmuch as car service rules were not enforced at certain stations on the C. C. C. & St. L. Ry. LaFayette dealers were discriminated against and in favor of dealers in the towns where the car service rules are not enforced.

Defendants denied this and submitted bill of lading covering this shipment of lumber, which contained the clause covering car service rules.

Judge Everitt decided:

That the free time allowed for unloading is reasonable.

That the charge is not excessive.

That there is no discrimination shown in favor of coal dealers and against lumber dealers.

That rules could be enforced at LaFayette and not at adjoining stations, without discrimination, as there is nothing in common between dealers at such points.

Judgment was given for the full amount of car service claimed.

BEFORE THE RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI. HEARD AT ST. LOUIS, APRIL 4th AND 5th, 1895.

EVANS & HOWARD FIRE BRICK COMPANY AND OTHERS. CONSTITUTING THE COAL DEALERS' PROTECTIVE ASSOCIATION OF ST. LOUIS.

VS.

THE ST. LOUIS CAR SERVICE ASSOCIATION. JAS. COWGILL, JOS. FLORY, COMMISSIONERS.

The complaint in this case is of unjust and unreasonable charges for demurrage, as relating to coal, lime, and kindred commodities, delivered upon the private tracks of consignees in the city of St. Louis, and praying for the restoration of a former rule (in force Sept. 1st, 1892), which provided for a charge of fifty cents per day for cars on private tracks, instead of $1.00 per car per day, as under the rules as at present enforced; and that some rule should be provided whereby the owners of private tracks should be entitled to a corresponding charge against railroads for leaving cars on side tracks beyond a reasonable time, after same are unloaded.

In dismissing the complaint, and refusing the prayer of the petitioners, the Commission says: "Hearing was had at St. Louis on the 4th and 5th of April, 1895, both parties being represented by counsel. Full investigation was had. Briefs were filed by the attorneys on May 25th, 1895. After a careful reading of the testimony, and full consideration of the arguments of attorneys, we are of the opinion that a charge of one dollar per day for the detention of cars is just and reasonable.

"Cars detained upon a private track are, in our judgment, entitled to the same demurrage as like cars detained upon any other track; the loss by detention being the same in either case, and for this reason we are of the opinion that the provisions of the car service rules are just and proper, and that the rules as formerly existing would not insure prompt service, but in our judgment would cause unreasonable delay in unloading, and consequent unnecessary detention of cars."

CIRCUIT COURT OF JACKSON COUNTY, MO., FEBRUARY, 1896.

UNREPORTED.

T. A. GRIFFITH

VS.

KANSAS CITY, FORT SCOTT & MEMPHIS R.R. CO.

NO. 10,698.

Opinion of E. L. Scarritt, Judge, on plaintiff's motion for new trial.

By the agreed statement of facts, upon which this cause was submitted to the court, it appears that defendants had promulgated a rule or order to the effect that the defendant company would on and after October 6, 1890, assess and collect a charge of one dollar per car per day, Sundays and legal holidays excepted, for delay of cars and use of tracks, on all cars that should be delayed in unloading, loading, or awaiting forwarding instructions, for more than a stated time after the same should be received, or should be at the disposal of the shipper.

The plaintiff had knowledge of this rule and order of the defendant company, and knew the same was in force at the times herein stated.

On January 10, 1891, defendant received for plaintiff in Kansas City a car load of coal in one of its own cars that had arrived on that day from Carbon Center, Mo. On January 12th, defendant notified plaintiff of the arrival and whereabouts of said car of coal, and further notified him in the same notice that "trackage charges will commence on this car January 19th, 1891, at 7 a. m." Plaintiff did not call for said coal until January 26th, 1891, at which time defendant demanded seven days charges at $1.00 per day for trackage and storage charges, and refused to permit plaintiff to unload the car until the same was paid. Plaintiff thereupon instituted a replevin suit, and took possession of the coal.

At the trial the court found the issues for the defendant, and the plaintiff insists in his argument upon a motion for a new trial, that the court committed error in so finding.

There are two questions involved in this case.

1st. Can the defendant legally charge storage for cars used and occupied by its patrons beyond a reasonable time after the contract of transportation has been fulfilled?

2nd. If so, has defendant a lien for such charges?

As to the first proposition, there is no question as to the reasonableness of the charge made in this case, nor does the plaintiff complain of the time allowed him in which to unload his coal.

A railroad company has the right to make reasonable charges for the use of its cars and tracks, when the delay is caused by the failure of the shipper or consignee to receive and unload the cargo, after due notice of its arrival. Of this proposition there can be no doubt, and the plaintiff in his brief admits that it is the law.

Has the defendant a lien for such charges?

This question the plaintiff earnestly contends should be answered in the negative. And cites several cases in support of his contention. (Chicago R. R. vs. Jenkins, 103 Ill. 588, Railroad vs. Chicago, 15 Neb. 391, Cromlien vs. Harlem Ry., I Abb (N. Y.) App. 472.

These cases are unsatisfactory in their reasoning. I think the cases that hold the contrary doctrine are more in consonance with reason and better adapted to the conditions and requirements of the present commercial age. It is admitted that the liability of the railroad company as a common carrier ceases when it lands the cargo at its destination. Its contract of carriage has been fulfilled. It is the duty, then, of the shipper to receive and unload the cargo. If he fails to do it, he fails to perform one of the conditions of his contract of carriage or transportation. He constitutes the railroad company his bailee, and the car which contains the freight, his storage house. Does not the railroad company then become his warehouseman? If the railroad company should unload the car and place the cargo in their warehouse they would have a lien for storage charges. This is not denied. Where is the difference, except that in case the goods are retained in the car, the shipper is saved the expense of unloading and removing them to a warehouse?

The shipper, by his failure or neglect to receive and unload the cargo, compels the railroad company to retain, house and care for his goods beyond the time, when by the terms of the contract of carriage they are bound to do so. For this extra service the railroad company is entitled to extra compensation. If the car is unloaded and the goods placed in a warehouse the company has an undoubted lien for such extra compensation. Now under the rule of the company, of which the shipper has notice, the car is made the storage house for the goods after a reasonable time has been given the shipper to unload. Is not this the rule and the knowledge thereof on the part of the shipper equivalent to an agreement on the part of both parties that the goods shall be considered as "stored" in the car, the same as if in a warehouse, and if so, does not the lien for charges follow as a matter of law?

There is another reason why this rule should be maintained. Railroad companies are quasi-public corporations. The innumerable ramifications of the combined railroad systems extend to every nook and corner of this country, and the loaded cars of almost every individual corporation are found at one time or another, upon the switches, sidetracks and unloading tracks of almost every city of any commercial importance on the continent. They are

transferred from one carrier to another until their final destination is reached. This is in the interest of commerce. It facilitates and lessens the expense of the transportation of property.

A railroad company cannot meet the ordinary demands for transportation if its cars can be tied up indefinitely at the pleasure of an individual shipper.. The individual shipper and the company are not the only ones interested. The public convenience and trade would be seriously interfered with if each individual shipper were permitted to retain the use of cars and tracks for storage purposes beyond a reasonable time. "Car famines" and consequent congestion of traffic would inevitably result from such a rule.

The increasing complexity and growing complications of railroad traffic have induced railroad companies in different places to organize what are known as Car Service Associations for the purpose of having an authorized agent to look after fugitive cars and others of every description, and to see that they are seasonably unloaded and returned to the ordinary channels of trade. This, together with the announcement of the rule that the companies shall have a lien for charges upon goods stored in cars, will, I think, have a salutary effect upon the car service in this State.

I submit the foregoing as some of the salient reasons for the conclusion I have reached in this case. The authorities cited below, in my opinion, fully support the conclusion of the court upon legal theories. I am pleased to follow the lead of some of our sister States which have already announced the same doctrine. (Gashweiler vs. Ry. Co. 83 Mo. 112; Gregg vs. I. C. Ry Co. 147 Ill. 550 S. C., 61 A. & E. R. R. Cs. 208; Miller vs. Mansfield, 112 Mass. 260; Miller vs. Ga. Pac. Ry. & B. Co., 88 Ga. 563; S. C. 50 A. & E. R. R. Cs. 79 and 15 S. E. Rep. 316; Hutch. on Carriers, Sec. 378; Ry. Co. vs. Filder, 46 Ga. 433; Norfolk & W. R. R. Co. vs. Adams, 56 A. & E. R. R. Cas. 330. On proposition as to lien, 28 Amer. & Eng. Enc. of Law p. 663, and authorities cited under note 4; Alden vs. Carver, 13 Ia. 253; Barker vs. Brown, 138 Mass. 340; Story on Bailments, (9th Ed.) Sec. 453 a.; Steinman vs. Wilkins, 42 Amer. Dic. 254 and note at page 287; Schmidt vs. Blood, 24 Amer. Dic. 143 and note at page 145; Ken-

tucky Wagon Co. vs. R. R. Co., 17 S. W. Rep. page 595; Rev. St. of Mo., 1889, Sec. 6806.

The motion for a new trial is overruled.

Robert Adams, Attorney for Plaintiff.

I. P. Dana, Attorney for Defendant.

CIRCUIT COURT OF COLES COUNTY, ILL., APRIL, 1896.

UNREPORTED.

FULLER & FULLER
VS.
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.

The following opinion by Judge F. M. Wright, rendered April 21st, 1896, sustains the right of railroad companies to hold freight for car service charges after allowing forty-eight (48) hours free for unloading.

Fuller & Fuller, lumber and coal dealers of Charleston, Illinois, received in July, 1894, and January, 1895, cars 58171 C. C. C. & St. L. and 18460 C. C. C. & St. L., respectively. These cars were placed in the usual manner for unloading and at the expiration of forty-eight (48) hours after arrival, a bill for $1.00 each car service was presented to consignee, who refused payment. In accordance with the rules of the Illinois Car Service Association of which defendant company were members, the cars were then padlocked by the railroad company's agent and held until five ($5.00) and sixteen ($16.00) dollars car service respectively accrued thereon, whereupon consignees replevined the property.

The two cases were by consent consolidated and a jury waived.

F. K. Dunn, attorney for plaintiffs.

Geo. F. McNulty and Neal & Wiley, attorneys for defendant.

Judgment for defendant.

WRIGHT, J.—The facts in these cases are that the defendant had transported two car loads of hard coal, one of them consigned to the plaintiffs, and the other to the Coles County Coal Company, and afterwards by the Coles County Coal Company transferred to the plaintiffs in Charleston, Illinois.

The defendant company had adopted a rule at this station, that after actual notice to the consignee, or his assignee, cars should be unloaded within forty-eight hours after such notice, and upon failure to do so the owner of the property should be subject to a charge of one dollar per day for car service.

Plaintiffs were so notified, and failed to comply with such notice, and the defendant thereupon refused to permit them to unload the cars unless such charges were paid, and thereupon plaintiffs replevined the cargo.

The question arising under the argument in these cases is whether a railroad company has a lien upon such freight, as is involved in this controversy, for a reasonable charge after an unreasonable delay in unloading the cargo.

It is not contended by counsel for plaintiff that the railroad company has not a right to make a reasonable charge for such service, but it is denied that the company has a lien upon the cargo for such charges.

Were it not for the decision of the Supreme Court of this State in the Jenkins case, reported in 103 Illinois Reports, the court would have little difficulty in reaching a conclusion.

However, the court has arrived at a conclusion which at least is satisfactory to itself. The common law rule in respect to liens is a familiar one, and of wide and varied application.

It is a familiar principle of common law that anyone who has bestowed any particular service or care upon any article of property which has been confided to his possession for such purpose, has a lien upon it for any reasonable charge in respect to such service or care. It is difficult to see why the facts in the present case do not call for the application of this familiar principle. It is difficult to imagine why a railroad company having bestowed a care upon property which it is conceded to be entitled to a reasonable charge in that respect should be excepted from the general rule which entitles parties performing such services to a lien upon the property.

All, in my judgment, that the Jenkins case determines is, that the consignee is not bound by the rules of the company unless he assents or agrees thereto. This principle is generally true, not only in cases like the present, but in all other cases.

It is not denied that the shipper is entitled to a reasonable time to unload the cars before he is subject to any charges.

The statute in respect to grain provides that twenty-four hours is a reasonable time. In the cases at bar the rule gives forty-eight hours. It is difficult to see why twenty-four hours in the one case should be a reasonable time and forty-eight hours in the other case should be unreasonable. Therefore, it can hardly be contended that forty-eight hours is an unreasonable time under all the facts and circumstances in the case in view of the express legislative provision in respect to freight which consists of grain.

The Legislature has seen proper to pass another statute in this State, which, while it is not upon the express subject involved in these cases, seems to me to have a very pertinent application, and to a certain extent will control the decision of this case. It is the statute relating to unclaimed propery, Chap. 141 of the Revised Statutes. The title of that Act is: "An Act to provide for the sale of personal property by common carriers, warehousemen, innkeepers, and by others having liens thereon." The first section of it, in part, reads as follows: "That whenever any trunk, carpet bag, valise, bundle, package or article of property transported or coming into the possession of any railroad or express company, or any other common

carrier, inkeeper or warehouseman or private warehousekeeper, in the course of its, or his business as common carrier, innkeeper, warehouseman or private warehousekeeper shall remain unclaimed and the legal charges thereon unpaid during the space of six months after its arrival at the point to which it shall have been directed, and the owner or person to whom the same is consigned cannot be found, upon diligent inquiry, or being found and notified of the arrival of such article, shall refuse or neglect to receive the same and pay the legal charges thereon for the space of three months, it shall be lawful for such common carrier, warehouseman, innkeeper or private warehousekeeper to sell such article at public auction, after giving such notice as prescribed by the statute."

Now, it seems to me that this statute plainly recognizes that railroad companies have a lien upon all personal property transported by them, not only for freights, though that is not the word used by this statute, but for the reasonable charges thereon.

It is conceded in these cases that the railroad company has the right to charge for car service after an unreasonable delay on the part of the consignee in unloading the freight. If that be true, then that becomes a legal charge, to the same extent that the freight rate is a legal charge, and this statute, by its title, and by its plain provisions, recognizes that lien and subjects the property, under certain conditions, and after the lapse of a certain time, to be sold to pay those legal charges.

This view of the case seems to the court to be more consistent with justice between man and man than the other view of the case contended for, which is, that the railroad company should sue the party for these charges.

To recognize a lien existing in favor of a common carrier is promotive of justice. It avoids litigation, and enables parties to settle these small charges without controversy.

The principal object of the rule of the company doubtless is not to secure the small charges made for the use of the cars, but to secure to themselves and to the public the use of the cars.

If the courts refused to recognize liens under the facts and circumstances shown in the evidence here, it would not

only be a detriment to the railroad company, but it would be disastrous to the public interests in view of the fact that it is necessary both to the railroad company and to the public that the railroad companies at all times have the use of their cars, in order that the public business may be properly transacted.

The finding and judgment, therefore, will be for the defendant.

CIRCUIT COURT OF ST. LOUIS, MO., JUNE, 1896.
NO. 98876.

UNREPORTED.

THE WABASH R. R. CO.
VS.
BERRY-HORN COAL CO.

This was an action by the Wabash Railroad Company to recover compensation for the detention and use of certain cars by the defendant, to whom the cars loaded with coal were upon consignment delivered by the plaintiff upon defendant's private track at its coal yard in St. Louis.

The coal was shipped to be unloaded by the defendant, who was allowed under plaintiff's rules as a reasonable time for unloading, three days or 72 hours on soft coal, two days, or 48 hours on hard coal; counting from 7 a. m. of the next day following the delivery of the cars to the defendant.

It was claimed by the plaintiff that it was the defendant's duty to unload the said cars within a reasonable time after delivery. That the time allowed by the car service rules as aforesaid was a reasonable time, and that the defendant having failed to unload said cars within the said time thereby became and was liable to compensate plain-

tiff for the use and detention thereof at the rate of $1.00 per car per day.

The defenses set up by the answer were:

First—That the charge was illegal and that it was unreasonable.

Second—That as to forty-eight cars it appeared that they were owned by other railways than the plaintiff company, and that as to these the plaintiff company was not entitled to recover because of the ownership by foreign companies.

Third—That the plaintiff was not entitled to recover because the character of the service rendered to the defendant by the plaintiff was bad, that they frequently delivered cars "bunched," and thereby damaged the defendant in a greater amount than the amount sued for by the plaintiff.

Fourth—That the plaintiff could not recover because of the peculiar properties of the soft coal, which it was shown could not be unloaded except from the cars to the wagons without disintegration and great loss to the defendant, which it was claimed compelled the defendant to use the cars as warehouses, particularly when the cars were delivered "bunched."

Fifth—That the plaintiff could not recover because the coal was delivered upon defendant's private track, of which they were the owners; that to charge them as much as was charged others upon tracks owned by the company was unlawful discrimination as against the defendant.

The action was for $138.00 demurrage charges, and was tried before the Court sitting as a jury.

The Court held: Honorable John F. Dillon, Judge:

That a common carrier has a right to impose a reasonable charge for the use and detention of its cars delivered to the consignee, and to be unloaded by him, when detained by the consignee, beyond a reasonable time for unloading.

That the charge of $1.00 per day for each car so detained was a reasonable and legal charge, and that the

time of 72 hours allowed for unloading soft coal and 48 hours allowed for unloading hard coal was a reasonable time for the unloading of the cars.

That as for the forty-eight cars belonging to other railroads and originally consigned through them, the plaintiff was entitled, as special owner or bailee thereof, to collect the demurrage charges thereon as upon its own cars.

That the question of good or bad service of the plaintiff in delivering cars to the defendant could not be considered in determining the legality or reasonableness of the demurrage charge sought to be enforced; nor could the quality of the coal or alleged necessity of handling it directly from the cars to the wagons be considered.

That the charge being legal, reasonable and just, plaintiff was entitled to recover the sum of $138.00 sued for.

CIRCUIT COURT OF WAYNE COUNTY, MICH. JUNE, 1896.

UNREPORTED.

WILLIAM A. M'EACHRAN & CO.

VS.

GRAND TRUNK RY. CO.

An action at law by William A. McEachran & Company, dealers in wood and coal, against the Grand Trunk Railway, for $500 damages for withholding three cars of cord wood for car service charges, was decided in favor of the defendant railway company by Judge W. M. Lillibridge, in the Circuit Court for the County of Wayne, at Detroit, Michigan, June 19, 1896. Messrs. Riggs & Lehman appeared for plaintiffs, and Edwin F. Conely, counsel for Car Service Association, appeared for the Railway Company.

The history of the case is as follows:

Three cars of wood were received at Detroit station in the latter part of January, 1895, and the consignees were notified of arrival in the usual way. McEachran called at freight office, and, having ascertained the amount of freight charges, left directions to deliver cars at a certain wood yard having private track delivery, and promised to send check for the freight. Plaintiffs were notified by telephone on two or three occasions, during the running of free time, that the check had not come to hand and promised to investigate the matter. Defendant did not receive check for freight charges until after one day's car rental had accrued, under the rules of the Car Service Association. Plaintiffs were then notified that car rental had thus accrued, and that cars would not be delivered until car rental was paid. Plaintiffs claim that they had left order for delivery, and had deposited check in the United States mail within proper time, and that they would do nothing further. Some correspondence ensued in which, on the one hand, defendant reiterated its demand for car rental and refusal to deliver unless paid, and, on the other hand, plaintiffs refused to pay car rental and said that they would hold defendants liable for the wood unless it was delivered as directed. Defendant finally notified plaintiffs that unless the car rental was paid the wood would be stored with a certain storage company to await release by paying car rental, and additional storage charges. Car rental was not paid and wood was stored. Plaintiff brought suit.

On the trial the foregoing appeared with evidence showing Car Service Rules and other material facts.

Judge Lillibridge ruled that under the testimony the Car Service Rules were valid and reasonable, and that unless there was something to take the case out of the operation of the rules, plaintiff could not recover. Plaintiff's counsel then contended that the defendant company had waived pre-payment of freight, but, on this point, Judge Lillibridge ruled that though possibly there was enough evidence for the consideration of the jury on the waiver, there was no testimony tending to show that the party with whom McEachran had the conversation on which plaintiff's claim of waiver was based, had any authority to release the company's rights in the matter. Accordingly, Judge Lillibridge directed the jury to render a verdict in favor of the defendant company.

SUPREME COURT OF THE DISTRICT OF COLUMBIA, WASHINGTON, D. C., JUNE, 1897.

Law No. 31524.

AUSTIN HERR

VS.

BALTIMORE & POTOMAC R. R. CO.

The facts of the above entitled cause are as follows:

The plaintiff, Austin Herr, who was engaged in building a house and improving a farm at Springfield, Md., near Bowie Station, on the Baltimore and Potomac Railroad, in January, 1891, purchased from Thomas W. Smith, a lumber dealer of Washington, four car-loads of lumber and from one Caton three or four car-loads of manure to be forwarded to him at Springfield. These consignments were received at Springfield about the 12th of January, 1891. Two cars of lumber and two cars of manure, remaining loaded beyond the forty-eight hours prescribed by the Car Service regulations, the agent of the defendant company presented Herr with a bill for demurrage on the four cars at $1 a day per car, which Herr refused to pay, assigning as his excuse for failing to unload the cars that the roads were not in a condition for him to haul. On Herr persisting in his refusal to recognize the right of the company to charge demurrage, the cars containing the lumber were locked up and delivery withheld, and after storing the required period the lumber was sold in pursuance of the provisions of the Maryland act authorizing the sale of freight, etc, for unpaid charges. (Poe's Code, Md. Gen. Laws, sec. 180.)

Before the goods were sold by the railroad company, Herr sued the defendant in the Supreme Court of the District of Columbia, in an action of trover, to recover $5,000 damages for the two car-loads of lumber and two car-loads of manure which he claimed had been unlawfully converted by said defendant.

The cause came on for trial, June 22, 1897, before Mr. Justice C. C. Cole and a jury, and lasted three days. Chas. C. Tucker, Esq., appeared for the plaintiff, and Messrs. Enoch Totten and J. S. Flannery represented the defendant company. The defendant proved by the testimony of a number of witnesses the necessity for making the regulations and that the charge of $1 a day for demurrage was reasonable. Messrs. Smith and Caton, the consignors from whom Herr purchased, admitted that they had received copies of the regulations concerning demurrage shortly after the organization of the Car Service Association, in August, 1890; but Herr denied all knowledge of said regulations. It was also shown that Smith and Caton prepaid the freight and took from the railroad company shipping receipts, which they retained. Among the conditions printed on the back of these shipping receipts (copies of which were produced) were the following:

"The carrier shall have a lien upon the goods for all freight advances, back charges, demurrage and claims in the nature of demurrage, expense of storage, necessary cooperage or baling."

"The carriage of said merchandise shall be complete and freight charges earned when it has been held a reasonable time without notice, say twelve working hours, subject to the owner's order at the station or place where it is above agreed to be delivered, and if not then removed by the person or party entitled to receive the same, it may be removed and stored, or kept in the car, station or place of delivery of the carrier, or otherwise at the sole risk and further expense of such person or party without notice, except that when merchandise is destined to or from the several "way stations" and platforms where station buildings have not been established by the carrier, or where there are no regularly appointed freight agents, it shall be at the risk of the owner until loaded into the cars and when unloaded therefrom, and when received from or delivered on private turnouts, it shall be at the owner's risk until cars are attached to and after they are detached from the trains."

At the close of all the evidence, counsel for the defendant asked the court to instruct the jury to return a verdict for the defendant, upon the following grounds:

1. That the defendant had a lien upon the goods for storage or demurrage (1) by contract and (2) by the common law, and having such lien the plaintiff was not entitled to the possession of the goods until the charges were paid, and, therefore, could not maintain an action of trover because to maintain such action he must have not only the right of property in the goods, but the right to the immediate possession of them.

Citing:

Miller & Co. vs. Georgia R. R. Co., 88 Ga., 563; 50 A. & E. R. R. Cas., 80 and notes.
Norfolk & Western R. R. Co. vs. Adams, Clement & Co., 90 Va., 393.
Kentucky Wagon Mfg. Co. vs. Ohio & Miss. Ry. Co., 97 Ky., —; 50 A. & E. R. R. Cas., supra.
Story on Bailments (9th Ed.) Sec. 453 A.
Jones on Liens, (2nd Ed.), Secs. 284 and 967-977.
Miller vs. Mansfield, 112 Mass., 260.
Barker vs. Brown, 138 Mass., 340.

Contra, cited by plaintiff's counsel:

Chicago, etc., R. R. vs. Jenkins, 103 Ill., 588.
Burlington, etc., R. R. vs. Chicago Lumber Co., 15 Neb., 391.
Cromeline vs. R. R. Co., 4 Keyes (N. Y.), 90.
Falconburg vs. Clark, 11 R. I., 278.

2. That the plaintiff was bound by the conditions of the shipping receipt or contract of shipment made with the defendant company by Smith and Caton, the consignors, (1) because they were the owners of the goods at the time of shipment, and (2) because they were the plaintiffs' agents in making the shipment.

Citing:

York vs. Central R. R., 3 Wall (U. S.), 107.
Bank of Kentucky vs. Adams Express Co., 93 U. S., 174.
Nelson vs. R. R. Co., 48 N. Y., 498.
Shelton vs. Merch. Dispatch Co., 59 N. Y., 258.
Squire vs. R. R. Co., 98 Mass., 239.
Barker vs. Brown, 138 Mass., 340.

The court granted the motion of the defendant's counsel and directed the jury to render a verdict for the defendant, holding that the regulation was valid and that the plaintiff was bound by the conditions of the shipping receipts taken by Caton and Smith, the consignors.

The opinion of the Court is as follows:

Gentlemen: I have no doubt in the world about the validity of this regulation of the railroad company, nor have I any doubt that it becomes a part of the contract with any shipper who makes a contract to have goods shipped, knowing of its existence.

That being so, there is no question but this contract is binding upon Smith and Caton, the shippers; and the only question about which I have had any difficulty at all during the trial is the one of whether it is also, as matter of law for the Court to determine, binding upon the plaintiff in this case. If it is binding upon the plaintiff as matter of law for the Court to determine, it must be upon the theory that the contracts made by Smith and Caton are binding upon the plaintiff because he did not make them, and he testifies that he had no knowledge of this regulation or matter that is relied upon here. And, therefore, that would be a question of fact for the jury, unless, as matter of law, the contract of these shippers is his contract, binding upon him.

I say "his contract." It might be that the contract might be binding upon him although the shippers were not his agents, and it might be upon this theory, which I suggested to Mr. Tucker during the argument: Smith was in possession of these goods. The railroad company has the right to treat as the owner whoever is in possession. They must deal with the party in possession. They cannot receive from anybody but the party in possession. And the title in these goods did not vest in the plaintiff in this case until the act of delivery to the railroad company was complete, until the railroad company had received the goods from Smith, or the shippers, and given their bill of lading, or receipt, or whatever they did give, so that the shippers would be able to charge them with the goods. The goods remained the property of the shippers, Smith and Caton, until that time. So that when the railroad company received this property from Smith and Caton, it belonged to Smith and Caton, and only became the property of the

consignee when it was completely in the care of the railroad company for transportation.

Therefore it is probably true that, strictly as matter of law, the railroad company received this property from the owner, and made its contract with the owner.

The York Company case, in 3rd Wallace, uses the language, "contracting with the owner;" and I have looked up the cases referred to, and find that in every case where the Supreme Court speaks of the contract of carriage, it speaks of it as between the owner and the carrier.

Now, if Smith was the owner of these goods when he made that contract with the railroad company, of course he had the power to create a lien on them until the title actually passed out of him and into the plaintiff in this case. The act by which he created the lien, and the act that vested the title in the consignee, were simultaneous; and according to general principles (I have not any decided case upon that point) I think that must be so.

I think the principle must be that where a man orders goods as the plaintiff did in this case, he does not become the owner of the goods upon giving the order. Unless there is something to the contrary in the contract between him and the party from whom he orders, the title vests in him when the property is delivered to the carrier to be carried; and in a case of that kind, it seems to me that the owner of the goods who delivers them to a carrier in pursuance of an executory contract to sell them to the consignee, must of necessity have the power to make any contract in relation to the carriage of the goods that it would be reasonable and proper to make.

Now, if I am right about that, Smith created this lien upon this lumber, regardless of the question whether he was acting as agent of the consignee or not.

I cannot distinguish the case of the York Company, in 3rd Wallace, from this. There the people in St. Louis I think, who were cotton brokers, had cotton in their possession for sale, and agreed to sell it to this Eastern company, and, in pursuance of that executory contract to sell, delivered this property to the railroad company in St. Louis, and made this contract. The Supreme Court holds that that contract is binding upon the consignee, although that contract cut down the common-law liability of a com-

mon carrier, something they had no express authority to do; but it could only be held upon the ground that the consignor was the general agent of the consignee for the purpose of making any proper contract of carriage.

There is a later case in 93 U. S., 174, the case of the Bank of Kentucky vs. The Adams Express Company, where the question was whether the bill of lading taken by the Louisiana Bank was binding upon the Kentucky Bank. In that case a certain instruction which I will read was given by the judge who tried the case; and although the case was reversed upon another point, the Court refer to that particular instruction, and say that they approve it; that it is in accordance with the law as held by the Supreme Court of the United States.

The instruction is as follows:

"If the jury believe that the teller of the Louisiana National Bank presented a bill of lading to the agent of the express company for his signature with the blanks filled up, and at such time delivered to the agent the package of money, without disclosing who was the owner of it, but addressed to the plaintiff at Louisville, that the bill of lading was signed and re-delivered to the teller, and forwarded to the plaintiff at Louisville, then the bill of lading thus signed constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff"—

That is, the Bank of Kentucky—

"Is bound by the contract, whether it expressly authorized the Louisiana National Bank to make it or not."

Now, that is precisely this case; and the cases read from New York, and the one from Massachusetts, by Col. Totten, are all in the same direction. Mr. Tucker has cited two or three cases which undoubtedly seem to contradict that doctrine, but the great weight of these cases that I have had before me today is the other way, and I think the reason is certainly the other way. And, of course, while it is possible that my mind might be changed upon further argument and examination, I am obliged to dispose of this question now; and my best judgment at

this time is that these contracts, made by Smith and Caton, are binding upon the plaintiff in this case. That being so, they created a lien, a conditional lien, upon this property, in favor of the railroad company, at the rate of a dollar a day for each car, after the lapse of forty-eight hours. It is admitted that Mr. Herr received notice when these cars were put there; that they remained more than forty-eight hours; that the demand for this storage, or demurrage, or whatever it is, was made upon him, and he refused to pay it; and those being the facts, a lien is established in favor of the company, and they had the right to hold the goods until the lien was paid. The disposition by them of this property for the purpose of paying the lien would not be a conversion; and under that state of the case, the plaintiff could not recover."

CIRCUIT COURT, JEFFERSON COUNTY, KY., CHANCERY DIVISION, AND BEFORE JAMES H. HAZELRIGG, JUDGE OF COURT OF APPEALS.

APRIL, 1898.

DUCKWALL
VS.
C. C. C. AND ST. L. RY. CO.

E. G. Duckwall & Company obtained a mandatory injunction against the C. C. C. & St. L. Ry Co. commanding it to deliver on their private siding cars of grain consigned to plaintiffs at Louisville. The Railway Company had refused to deliver on consignee's private siding because plaintiffs were indebted for car service to the P. C. C. & St. L. Ry. Co. and L. & N. R. R. Co. members with defendant, of the Louisville Car Service Association.

The lower court granted an injunction and afterward refused to dissolve it, on the ground that defendant could not withhold a car because of unpaid charges on previous cars, and a fortiori unpaid charges to other railway companies on previous cars; and that plaintiff had no adequate remedy at law. That the case of Kentucky Wagon Mfg. Co. vs. O. & M. Ry. Co., 98 Ky., 152, was inapplicable because in that case the consignees had combined to resist the rules of the Car Service Association ascertained by the Court of Appeals to be reasonable; that Duckwall admitted the reasonableness of the rules, but simply refused to pay bills whose correctness under the rules he disputed.

On the motion before Judge Hazelrigg to dissolve the injunction, the Railway Co. contended that there was no distinction in principle between the two cases. That on the theory of the lower court a plaintiff to obtain an injunction against the enforcement of the car service rules, need only proclaim his approval of them, while he proceeded to disregard and violate them. That if he refrained from impeaching their correctness he might, ad libitum, refuse to pay charges against him arising under the rules and obtain a mandatory injunction compelling delivery of cars. That such a doctrine would destroy the efficiency of the rules. That in refusing to pay car service charges assessed against him, Duckwall had, as had the plaintiffs in the Wagon Company case, committed the first wrong, and was, therefore, not entitled to the interposition of the Chancellor. Defendant quoted from the opinion 98 Ky., 152, that: "The conditions upon which it may be put in "force cannot exist except at the will of the shipper. He "must first wrongfully refuse to comply with the rules be- "fore any excuse is given the carrier to do the second "wrong, and we think the appellant cannot complain of the "wrongdoing of the carrier, made possible by his own "wrongful refusal to comply with other reasonable regula- "tions of the carrier." That if the principle announced in the Wagon Co. case was inapplicable to a consignee disputing a bill, every consignee could escape the application of the principle by simply disputing car service bills. That a carrier is more at a shipper's mercy in regard to car service charges than freight charges, because his lien entitles him to hold the freight for the latter; but that although the courts recognize his lien for the former, he would be compelled to part with the lien if compelled by injunction

to deliver cars in advance to a private siding. That he cannot know when placing the car on the private track that it will be unloaded in 48 hours, so that when the charge becomes possible the car is beyond the carrier's control. That, consequently, the only remedy of the carrier is to retain on its own delivery tracks the cars of consignees, who refuse, or fail, to pay charges.

Judge Hazelrigg delivered the following opinion:

It is somewhat difficult to distinguish this case from that of Wagon Company case. It is true that company denied the legality of the Association, and sought to destroy it, and while this is not attempted here, still the Duckwalls refused to pay the demurrage charges when presented. And if this is permitted, the efficiency of the Association is seriously impaired, if not destroyed. It seems to me the better rule for all parties is to enforce full compliance with the car service regulations, unless they should be shown to be oppressive and unjust in some particular case. Here there is at least a fair showing made of the correctness of the charges against the Duckwalls, and they ought to have paid the bills, relying on the Association for redress, as provided in its by-laws, or failing in which, applying to the courts for relief.

If the plaintiff ought to have paid these bills at the time they were presented, not waiving their right to question their correctness afterward, then when they refused to so pay, were they not guilty of the first wrong? And if so guilty, they are in the same attitude as was the Wagon Company in the case cited. This is the way the matter occurs to me on this preliminary hearing; and, therefore, the order overruling the motion to dissolve the injunction ought not to have been made.

The injunction ought to have been dissolved, and it is so ordered.

This Apl. 16, 1898.

J. H. HAZELRIGG,
Judge Ct. Appeals.

From this it appears that if the consignee be permitted to decline to pay bills and nevertheless enforce by in-

junction delivery of their cars on their private track, the efficiency of the Association is seriously impaired, if not destroyed; and that the better rule is to enforce the regulations unless shown to be oppressive in a particular case, relying on the Association for redress, and failing that, appealing to the courts.

It would seem from this enunciation that in such a contest some foundation for the charge made by the carrier must appear, although this is not entirely clear, for the judge announces that the plaintiff ought to have paid the bills without prejudice to questioning their correctness afterward.

Possibly it would be consistent with the opinion to hold that the claim of such fees should be acceded to in every case just as a passenger must yield to the conductor's claim of his fare, and afterward raise any question which he may desire with the carrier. As it would be impracticable to permit a passenger to try with the conductor a claim of offset against the Company so it would be impracticable while the car stands unloaded upon the sidetracks to discuss the merits of the charges made by the carrier for car service; but in each case the question may be litigated afterward.

The case was elaborately argued in lower Court, and Court of Appeals by J. A. Allen and Augustus Elbillson for Duckwall, and Pirtle and Trabue, counsel for the Louisville Car Service Association, and Humphrey & Davie, for the C. C. C. & St. L. Ry. Co

IN THE CIRCUIT COURT OF MOBILE COUNTY. ALA., JUNE 24th, 1898.

UNREPORTED.

THE GULF CITY CONSTRUCTION COMPANY

VS.

LOUISVILLE & NASHVILLE RAILROAD CO.

This was a suit to recover three hundred and eighty dollars, car service paid by the Construction Company to the Louisville & Nashville Railroad Company at the rate of one dollar per day per car from the expiration of forty-eight hours after the arrival of the freight to the time the freight charges were paid and the freight delivered. The plaintiff offered evidence showing the following facts, viz.:

The Construction Company was building a railroad for the Mobile, Jackson & Kansas City Railroad Company, and had constructed tracks and a railroad yard at a point in Mobile, known as "Frascati." Carnegie shipped steel in car load lots to the Construction Company to be delivered in the yards of the Mobile, Jackson & Kansas City Railroad at Frascati, with a guaranteed rate of freight endorsed upon the bills of lading. Some of the cars arrived in the early part of June, 1897, and others arrived from time to time down to July 17th, 1897. As fast as a car load would arrive, the Louisville & Nashville Railroad Company sent notice of the arrival to the Construction Company, stating the amount of freight and charges on each car. In each instance the freight charge exceeded the rate stipulated upon the bill of lading. Immediately upon receipt of the first notice the Secretary of the Construction Company called the attention of the General Agent of the Louisville & Nashville Railroad Company at Mobile, to these discrepancies and asked that the errors

be at once corrected, and the agent promised to do so. In the early part of July, the Secretary of the Construction Company paid the railroad company twelve hundred and odd dollars on account and received part of the steel, but agreed upon no settlement of the differences. On July 17th the Louisville & Nashville Railroad Company presented a bill against the Construction Company for freights and charges, corrected according to the Construction Company's contention, but including a car service charge of one dollar per day per car from forty-eight hours after arrival to date, and refused to deliver the freight until the whole bill was paid, and the Construction Company paid the bills under protest. The Construction Company, previous to this transaction, paid similar car service charges and knew the rules of the Association, but on application the railroad company had refunded the charges by the instructions of the association. When the plaintiff's evidence was closed, the defendant moved the court to strike out all of the evidence upon the ground that it did not make out a case and contended that the railroad had a right to charge a reasonable amount for the use of its cars while being detained by plaintiff's failure to pay freight and charges and receive its property. That the Construction Company might have tendered the proper freight and charges and demanded its freight, but as it did not do so it could not avoid liability for car service on account of the overcharge; that to put the railroad in fault for not delivering, it should have tendered what was justly due. The court granted the motion and rules out all of the evidence. No further evidence was offered, and the court, at the request of the defendant, charged the jury to find a verdict for the defendant, which was accordingly done. The jury, under the instructions of the Court, then found a verdict for the defendant.

SUPREME COURT OF GEORGIA, MARCH 2, 1900.

35 S. E. R., 369.

DIXON, ET. AL.

VS.

CENTRAL OF GEORGIA RAILWAY CO.

Carriers—Switching Charges—Parol Evidence—Special Contract—Rights of Parties—Freight—Delivery—Refusal to Pay Charges.

1. The test of distinction between "transportation" service, relatively to loaded freight cars, for which a railway company can lawfully charge tonnage rates, and "switching" or "transfer" service, for which it is restricted to a fixed charge per car, is not whether the movement of the cars involves the use of a portion of the company's main line or that of another; for there may be a transportation service over one or more spur tracks of the same company, if the contract of affreightment requires no movement over other tracks or lines of railway, whereas a switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned or are to be earned.

2. Parol evidence is admissible to explain the meaning of the terms "transportation," "switching," and "transfer," as applied to railroad operation.

3. A contract between a city and a railway company for reduced freight rates upon goods transported by the company for the municipality does not inure to the benefit of one under contract with the city to deliver to it at a fixed price supplies f. o. b. at the point of delivery.

4. Though a person who had contracted with a city to furnish it with coal for use in running a system of water-

works became the head of the water commission of such city, he could not, because of his official position as such, avail himself of the terms of a transportation contract between the city and a railway company, whereby the former had secured reduced freight charges upon goods or supplies hauled for its benefit.

5. The relation of shipper and carrier does not begin between the owner of goods and a railway company, though the former may have delivered the goods to the latter, if after such delivery anything required, either by law or the contract, remains to be done by the shipper, and in such case the rights and liability of the company are those only of a warehouseman.

6. Where goods to be shipped are situated upon a spur track of a railway company, and the owner has no track scales, thus rendering it necessary to move the loaded cars to the company's depot for the purpose of weighing the same, so as to ascertain the proper amount of freight charges, the delivery of such cars will be treated as having been made to the company at such depot.

7. When such a delivery is in fact made, and the shipper refuses, on demand, to pay the proper freight charges, and the goods are left in the custody of the company, it has a lien upon such goods for proper storage charges, whether they be left in the cars or removed into a warehouse.

8. Where several cars are left in the custody of a railway company under such conditions as those just indicated, the company may retain possession of the goods in all of them until its just charges are paid.

9. While the motion for a new trial contained a large number of grounds, the principles of law above announced are controlling in this case, and, upon the merits, the evidence demanded the verdict.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; R. Falligant, Judge.

Action by the Central of Georgia Railway Company against C. H. Dixon & Co., Agents. Judgment for plaintiff. Defendants bring error. Affirmed.

Saussy & Saussy, for plaintiffs in error. Lawton & Cunningham, for defendant in error.

LEWIS, J.—On the 1st day of August, 1898, the Central of Georgia Railway Company instituted, under Section 2816 of the Civil Code, proceedings to foreclose a lien on four cars of coal received by it from the defendants, C. H. Dixon & Co., Agents, on June 7, 1898. It was claimed in the affidavit of foreclosure that this coal was received by the company at its place of business in the city of Savannah, to be shipped to the waterworks in said city, for which the defendants refused to pay the regular rates of 17½ cents per ton demanded by the company, and since the date of their receipt the four cars of coal have been in its possession, as depositary for hire, in its yard in the city of Savannah. The proceedings were for the purpose of foreclosing a lien claimed by the company as a depositary for hire. It was further urged in the affidavit of foreclosure that these cars of coal were received by the company with the understanding that Dixon & Co., Agents, would prepay any freight charges thereon, which they refused to do. Fi. fa. was issued upon this affidavit of foreclosure, and levied upon the coal. To this proceeding C. H. Dixon, trading under the name of C. H. Dixon & Co., Agents, filed an affidavit of illegality on the several grounds, embracing substantially the following as defenses: (1) It did not appear from plaintiff's affidavit it had completed its contract of shipment, so as to entitle it to any lien for freight charges. (2) The place of shipment was the waterworks, and it did not appear that there was any delivery of the freight tendered at the place of destination. (3) The charge in the proceedings for foreclosure was for storage, while the bill of particulars attached thereto was for demurrage, for which charge there is no lien prescribed under the statute. (4) The company had no lien on the property levied upon. (5) The amount set forth in the affidavit of foreclosure or no part thereof was due. (6) Plaintiff received the cars from the place of business of defendant on River street under a contract to deliver the same, as per consignment, to the city of Savannah, at the wharf of said railroad, at the end of River street, in said city; and, before any charges could accrue against the shipment, defendant tendered to plaintiff the cost of track-

age along River street, the usual and customary charge for such service, and a charge regulated under the ordinances of the city of Savannah, to wit, one dollar per car; that the company operates the line on River street for purposes of transfers, said track being no part of the main stem of the railway. This defendant, in behalf of the city of Savannah, and under authority of the chairman of the waterworks commission, which has control of the Savannah waterworks, accepted the freight at the wharf of plaintiff, and ordered the freight transferred to the Savannah waterworks, and tendered plaintiff the sum of one dollar per car, being the rate for such transfer. Plaintiff refused the tender, and retained possession of the goods unlawfully. It is further claimed in the affidavit of illegality that the rules of the railroad commission of Georgia provided that the failure of a railroad company to deliver freight entitles the shipper to recover damages at the rate of one dollar per car, and that was pleaded as an offset. It was the duty of the plaintiff to deliver the freight to the Florida, Central and Peninsular Railroad Company, with which company it had a contract concerning transportation of freight for said waterworks, whereby the last named company was to haul all freight to said point without charge, inasmuch as the spur track leading from the main line of the plaintiff to the waterworks was used in part by the Florida, Central & Peninsular Railroad Company as a means of approach to the depot in the city of Savannah. It also alleged that the waterworks were not situate on the main line of plaintiff's railway, nor upon any connecting road, so as to enable plaintiff to charge regular freight rates for transportation; but the waterworks were situate on a spur track built by the city of Savannah, and by it turned over to plaintiff's predecessor upon express condition that all freight consigned to said city at the waterworks should be hauled and delivered at the rate of one dollar per loaded car as trackage; and the waterworks not being upon the main line of plaintiff, nor upon the line of any other railroad or station, or public place for delivery of freight, and being within three miles of plaintiff's wharf and the wharf of defendant, said waterworks stand upon the same footing as warehouses and factories, and plaintiff, upon completion of its contract of affreightment, was not entitled to charge any more than the rate allowed by law for trackage.

It substantially appears from the evidence in the record that C. H. Dixon & Co., Agents, were coal merchants, whose place of business was on River street, adjacent to the River street track of the Central Railway. Dixon & Co. had a contract with the water commissioners of the city of Savannah to deliver coal f. o. b. cars at the waterworks, which was about two miles out of the city, and connected with the terminals of the Central by a track known as the "Waterworks Track." This last track was also owned by the Central, which laid the same on the land belonging to the city, and, upon completion of the waterworks, the track and roadway was ceded by the city to the Central, and a contract was entered into between them "that the trackage charge to the city shall not exceed the sum of one dollar per loaded car for all cars received from, or delivered to, the said city on said spur track." It seems this track was under lease to the Florida, Central & Peninsular Railroad Company, being the track on which its railroad entered the city, but it was agreed in the lease that railroad would switch the cars of the Central of Georgia "to and from the waterworks, and such other industries as may be located thereon, over said track, free of compensation, and as promptly as their own similar service is performed, and when so engaged the agents and servants of the Florida Railroad shall be considered as servants of the Central Railroad." It would seem therefore, as to this case, the waterworks track may be treated as substantially the track of the Central of Georgia Railway.

C. H. Dixon & Co. was a firm composed only of C. H. Dixon, who became insolvent a few months before the time of this shipment. Pending the incorporation of a company which was to be known as the "C. H. Dixon Company," the incorporators of which were the said C. H. Dixon and his two brothers, M. W. and James M. Dixon, the business formerly conducted by the defunct firm passed into the hands of C. H. Dixon & Co., Agents, who assumed the contract with the waterworks commissioners to deliver coal free on board cars at the waterworks. C. H. Dixon ran the business of Dixon & Co., Agents, whereof his brother, J. M. Dixon, was the principal. J. M. Dixon was surety for the faithful performance of the contract of Dixon & Co. with the waterworks commission, and he was also chairman of the waterworks commission, a body

created by the legislature. See Acts 1895, p. 300. That act provided that an oath of office be taken by each member of the commission, which was duly taken by J. M. Dixon, as follows: "I swear that I will not be concerned or interested, pecuniarily, in any way * * * in any contract for the purchase of property or supplies for said waterworks, while a member of said board." C. H. Dixon & Co., Agents, were not on the credit list of the Central of Georgia Railway, and the pre-payment of freight was always exacted. The rate which the Central had uniformly charged for shipments of coal from any point on the River street track to the waterworks was 17½ cents a ton. The railroad commission rate for a distance of five miles and under was 35 cents per ton. The distance from Dixon's wharf to the waterworks is 2.64 miles. In 1896 C. H. Dixon and H. M. Comer, who was then receiver of the Central, by contract, made the rate of freight between these points of 17½ cents a ton, which seems to be half of what the law permitted the Central to charge. For an ordinary transfer or switching service on the River street track the railroad's charge was uniformly one dollar per car.

It appears from the evidence that these rates were uniformly charged and paid by Dixon & Co., Agents, who had shipped a number of cars under their contract with the Central, and that they paid these charges without any objection whatever up to the time of the shipment in question. Dixon & Co., Agents, had no track scales at their wharf, and the only way in which the amount of freight could be determined, if the tonnage rate applied, was to weigh the cars on the track scales in the Central Railway yards. The four cars in question were, on this account, loaded with coal on the River street track, adjacent to Dixon's place of business for the purpose of being shipped to the waterworks. The Central took the cars up to its yard, weighed them, and sent the weights to Dixon & Co., Agents, with a bill for $17.20, freight charges, that being the amount at the rate of 17½ cents per ton, and the shipper, instead of sending that amount, sent the Central a check of $8, or $2 per car. This the Central refused to accept. It seems the shipper thereupon complained to the city that the Central had violated its contract with the city, and would not transfer the cars from the wharf to the waterworks for one dollar per car. The city declined to grant

the relief sought by the shipper, and replied that, his contract being to deliver coal f. o. b. cars at the waterworks, it was a matter of indifference to the city how much freight the shipper paid.

It appears from the evidence that J. M. Dixon was the principal actor in this matter for C. H. Dixon & Co., Agents, and that he was also chairman of the water commission. A letter was written by them to the agent of the Central at its wharf, consigning the cars to the city of Savannah, for which they made a tender of one dollar per car for River street trackage. J. M. Dixon, as chairman of the commission, also wrote a letter to the agent of the Central, instructing him to transfer to the waterworks, in accordance with the agreement between the city and the railway, at one dollar per car, the coal which had been consigned to the city at the Central wharves; thus making the rate from Dixon's wharf to the waterworks only two dollars per car. It further appears from the record that J. M. Dixon did not consult any member of the board of the water commission about writing the letter, and that the money he tendered came out of his own pocket. The shipper having declined to pay the rate demanded, the cars remained where they were when the difference arose between the parties, and the railway assessed charges for storage, and foreclosed its lien as a depositary for hire.

1. The vital question in this case, and one upon which its determination mainly depends, is whether or not the service for which the railway was charging the shipper of this coal was "transportation" service or "transfer" or "switching" service. It appears from the record that an appeal was made by the plaintiff in error to the railroad commission, by which proceeding it was sought to get the railroad commission to enforce in this matter its rule No. 25 in language as follows: "A charge of no more than two dollars per car will be allowed for switching or transferring a car from any point on any road to any connecting road or warehouse within a space of three miles from starting point, without regard to weight or contents." From the facts in the record it appears that this rule manifestly applies to what is known as "switching" or "transfer" service, and it was claimed by counsel for plaintiff in error that it was applicable to this case, where it was purely

a transfer service, as the shipment of the goods was confined to what is known as "spur tracks" of the railroad. On the other hand, it was contended by counsel for defendant in error that that rule had no application whatever to this service, for transfer or switching service only relates to the removal of cars over spur tracks after they have reached the terminal point of some railroad line, and, without being unloaded, are transferred on a spur track usually to the place of business of the consignee. It is therefore contended that switching service applies only in cases where there necessarily preceded or succeeded such service the payment of freight for transportation over some line of railway. From this contention it would follow, for example, that if Dixon & Co. had ordered freight over the Central to be shipped to Savannah from Macon, Ga., they would be liable for regular rates of transportation from that point to the railway terminal at Savannah, and the Central, in shipping the freight from its depot over the spur track to Dixon & Co.'s place of business, would simply be entitled to the rates fixed for such transfer service; or, if Dixon & Co. desired the Central to transport freight from their place of business in Savannah to Macon, and the Central transported the goods over its spur track from the shipper's place of business to its depot, it could only charge additional, for this part of the transportation, simply the switching service rate. We think the case is quite different when the shipment of freight is entirely confined to such a spur track. The uncontradicted evidence shows that the necessary expenses for such a shipment could not be met by payment of the small rate prescribed for a transfer or switching service, and these small rates are chargeable only in cases where revenue is derived for transporting the freight over a railway which must either precede or follow the service rendered on the spur track. In this case the contract of carriage involved a transportation from Dixon's wharf to the waterworks. That constituted the entire service, and the fact that that entire service was rendered on spur tracks of a railway company we do not think prevents it from being transportation, pure and simple.

It appears from the record that the shipper in this case appealed to the railroad commission to enforce its rule No. 25, above quoted, and that, after hearing the application, the commission decided that the shipper was not entitled to

the relief sought, and that the service rendered by the Central in the case was really for transportation, and hence it had the right to make the charge in accordance with the rule of the railroad commission, which allowed for the transportation of freight over routes under five miles a rate of 35 cents per ton. In the present case the Central only charged half this sum. It does seem that this decision of the railroad commission in this identical case should operate as conclusive evidence of the reasonableness and legality of the charge exacted by the Central against the shipper. Section 2189 of the Civil Code provides: "The commissioners shall make reasonable and just rates of freight, and * * * shall make reasonable and just rules and regulations, to be observed by all railroad companies doing business in this state, as to charges at any and all points for the necessary handling and delivering of freights." And, under Section 2190 of the Civil Code, it is provided that in suits brought against such corporations the commission's schedules of rates shall be deemed and taken in all the courts of this state as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for transportation. Even if the construction the commission has placed upon its own rule is not conclusive upon the parties, it certainly should receive great weight, under the law, with the courts. But, in addition to this, a quantity of evidence was introduced in behalf of the Central Railway by witnesses expert in railroad business, and familiar with the meaning of certain terms used in connection with such business, who defined what was meant by transportation and switching service, and distinguished the difference exactly in accord with the contention of counsel for defendant in error in this case. We therefore think, in the light of all the evidence in the record, that the service undertaken by the Central in this case was purely transportation service, and that the rates with reference to transfer or switching cars over spur tracks had no application whatever.

2. Error is assigned in the motion for a new trial upon the admission of parol evidence for the purpose of explaining the meaning of the terms "transportation," "transfer," and "switching," as applied to railroad corporations. This question involves the construction of words used in connection with a particular subject-matter. Ex-

perts in the business were offered as witnesses to testify as to their common acceptation and usage when applied to the operation of railroad companies. We think the Political Code Section 4 (1) settles the question. It declares: "The ordinary signification shall be applied to all words, except words of art, or connected with a particular trade or subject-matter, when they shall have the signification attached to them by experts in such trade, or with reference to such subject-matter." See, also, Civil Code, Section 3675 (2), where it is declared: "Words generally bear their usual and common signification; but technical words, or words of art, or used in a particular trade or business, will be construed generally, to be used in reference to this peculiar meaning. The local usage or understanding of a word may be proved in order to arrive at the meaning intended by the parties." See, also, 1 Greenl. Ev. 280, where the principle of allowing parol evidence in such cases is clearly recognized.

3, 4. It was further insisted in behalf of plaintiff in error that the contract between the city of Savannah and the Central for reduced freight rates upon goods transported by the company for the municipality was binding upon the former in this case, and that it could not charge for service of this transportation from the depot to the waterworks any more than the price stipulated in that contract of one dollar per car. It is manifest from the evidence in the record that this contract between the Central and the city had nothing whatever to do with the contract between the parties to this case. The contract made with the city had direct reference only to such goods as were consigned to the city, and for the payment of which the municipality itself was liable. In this case the shippers were under contract with the water commission of Savannah to deliver to it coal f. o. b. the cars at the waterworks. It is true that the active manager of the business of Dixon & Co., J. M. Dixon, was also chairman of the water commission. He adopted the scheme of writing a letter to the agent of the Central instructing him to transfer to the waterworks the coal which had been consigned to the city, but he had no authority whatever for giving such direction. It was certainly never authorized by the city itself, through its officials, nor was it authorized by any resolution or other

action taken by the board of water commissioners. On the contrary, it appears that he intended to make the payment himself out of his own pocket, and that it was in no wise a charge upon the city. When he made his appeal to the municipal authorities of the city, they gave the same construction of this contract as was adopted by the Central, and declined to grant any relief whatever.

5, 6. It was further contended by counsel for plaintiff in error that the railway company in this case occupied the position of a common carrier; that it had failed to comply with its obligations to transport the goods to their destination; that it never occupied the position of a warehouseman, and therefore had no lien upon the property for storage. It was further contended that the duty devolved upon the company, unless it intended to transport the property to its destination, to re-ship it to the consignor, and that the company had no right to hold the same, and thus accumulate against the shipper charges for storage. Under the facts of this case, we do not think there is any question but that the company occupied the position of a warehouseman. It is true the goods had been transferred from the place of business of the shipper to the company's yards, but that was absolutely necessary, in order to determine what would be a proper charge for transportation. There was no means of weighing the cars at the shipper's place of business, where they were loaded. This weight was absolutely necessary in order to determine the amount of freight, and hence they had to be transferred to the company's yards for this purpose. We think, therefore, the delivery of the cars should be treated as having been made to the company at its depot. Under the contract between the carrier and shipper in this case, a prepayment of the freight was required before any obligation rested upon the carrier to transport the goods to their destination. This the shipper wrongfully refused to pay, and, clearly, the duties of the company as a common carrier did not begin, although the delivery of the goods for shipment had been made, as long as anything remained to be done by the shipper himself. In 5 Am. & Eng. Enc. Law (2d Ed.) p. 261, that author says: "The rule, broadly stated, is that if, after the delivery of the goods for shipment, anything remains to be done by the shipper, the liability of the carrier as in-

surer does not attach, and it is responsible only as a warehouseman." In the case of Barron vs. Eldredge, 100 Mass. 458, Colt, J., in discussing this subject, says: "The responsibility of a common carrier for goods intrusted to him commences when there has been a complete delivery for the purpose of immediate transportation. * * * The delivery must be for immediate transportation, and, of course, it cannot be complete if anything remains to be done by the shipper before the goods can be sent on their way." The same principle is announced in Hutch. Carr. Section 63. It is therein stated that no one can be chargeable as a carrier, but merely as a warehouseman, until the shipper has complied with every duty upon him which it was necessary for him to discharge before shipment, and the author thus illustrates: "As where the goods are deposited without instructions as to their place of destination, either by marks or otherwise, or to await orders, or until the charges for the transportation are paid, if that is required by the carrier; or if anything remains to be done, or any expense to be incurred, to put them in a condition to bear transportation." While the company, therefore, retained this property on board its cars at its depot, on account of the failure of the shipper to comply with the conditions precedent to its shipment, it occupied, as to him, the position of a warehouseman. There is nothing in the contention that the company should have returned the property to the consignor. He made no demand therefor. On the contrary, he insisted upon the company transporting the goods to their destination without complying with his obligations under the contract. The position of the company, therefore, was lawful, and it had a right to charge storage for this purpose. The fact that the goods were stored in its cars instead of a warehouse did not change the company's position as a depositary for hire. Miller vs. Banking Co., 88 Ga. 563, 15 S. E., 316, 18 L. R. A. 323.

7. It appears that the Central Railway adopted Rule 4, Section 2, of the car service rules, which is in the following language: "On cars placed for loading, free time will expire forty-eight hours from the time the loading of car commences, and car-service charges will continue on same until shipping instructions are given and bill of lading taken out." In accordance with the power conferred upon

the railroad commission by virtue of Civil Code, Section 2206, to prescribe a schedule of maximum rates and charges for storage of freight, the commission has passed rules known as "demurrage rules"; regulating charges for storage of goods in cars, which rules are similar to the ser-service rule above quoted. The rates charged by the Central in this case were within the limits prescribed by those regulations. The term "demurrage," as used in its technical sense, applies to maritime law, and has been held by some authorities that it is confined to carriers by water; but it is evidently, under these rules of the commission and by railroad companies, not used in its technical sense. It was no doubt adopted as a convenient term, as contended by counsel for defendant in error, to represent the storage of goods in cars, as distinguished from the storage in warehouse. The right to charge for such storage in cars arises when the goods are necessarily detained by virtue of the failure of the shipper to comply with his obligations to the carrier. The company is in this way deprived of the use of its cars, and, even if the rules adopted in this particular case as to such charges did not apply, they would still be entitled to reasonable charges as a warehouseman or as a depositary for hire. In 28 Am. & Eng. Enc. Law, p. 667, it is stated: "In the absence of a special agreement as to charge, the law implies a contract to pay a rasonable compensation." In Elliott, R. R. Section 1567, that author in discussing this subject, says: "While it is probably true that this right [of demurrage] is derived by analogy from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases." The author then quotes the following observation from one of the decisions of the courts: "We see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea." On the same line, see Norfolk & W. R. Co. vs. Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530; Kentucky Wagon Mfg. Co. vs. Ohio & M. Ry. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850; 9 Am. & Eng. Enc. Law (2d Ed.) p. 261.

It is insisted by counsel for plaintiff in error that, even conceding the railway company had a right to make charges for storage of goods, it had, by operation of law,

no lien upon the property itself. If we are correct in the conclusion that the defendant in error occupied the position of a warehouseman, then, under the laws of this state, it has a lien upon the property, and can retain possession thereof until it is paid. Section 2928 of the Civil Code declares: "Depositaries for hire are bound to exercise ordinary care and diligence, and are liable as in other cases of bailment for hire; they have a lien for their hire, and may retain possession until it is paid." Section 2930 declares: "A warehouseman is a depositary for hire, and is bound only for ordinary diligence," etc. The right of the retention of goods by a carrier for charges for freight and storage, even when the property is stored upon cars, was virtually recognized by this court in Pennsylvania Steel Co. vs. Georgia Railroad & Banking Co., 94 Ga. 636, 21 S. E. 577. In that case it appeared that tons of rails, spikes, bolts, etc., had been shipped in car-load lots, which came into the possession of the defendant railroad company as the last connecting line. From each consignment the defendant retained one or two cars to secure itself for the freight and demurrage it claimed on such consignment, and delivered to the consignee the rest of the cars. It was held in that case that payment of the freight and storage must be made before the consignor can obtain possession. In Miller vs. Banking Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, this right of a carrier to collect its reasonable charges for storage in its cars was clearly recognized. In that case it seems the same rate was charged by the railroad company as in the case at bar, and it was there held the fact that this regulation was promulgated by a board of persons representing a combination of such carriers made no difference. On page 571, 88 Ga., page 318, 15 S. E., and page 327, 18 L. R. A., Simmons, J. (now C. J.), stated in his opinion the following: "We do not think it material, as affecting the right to make a charge of this character, that the goods remain in cars instead of being put into a warehouse." This right of the retention of the property to enforce its lien is recognized in Kentucky Wagon Mfg. Co. vs. Ohio & M. Ry. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850; and also by the following language in 4 Elliott, R. R. p. 2439, Section 1567: "It was held in the cases cited in the first note to this section that a railroad company can have no lien for demurrage charges,

but, as we have seen, those cases deny in toto the right to charge for delay or detention of cars, in the absence of a contract, and, to that extent at least, are contrary to the weight of authority. In several of the cases which assert the right to charge demurrage, it is expressly held that the company may have a lien for such charges, and in others there are intimations to the same effect."

Counsel for plaintiff in error cite some authorities in conflict with this view. Among them attention is called to 9 Am. & Eng. Enc. Law (2d Ed.) p. 270, where it is stated: "By the weight of authority, a railroad company has no lien on goods shipped for demurrage or damages in the nature of demurrage for delay in unloading the same, and consequent detention of cars or other property, unless a lien is given by contract or by statute." The author cites a few cases in support of the text, and makes no reference to the decided weight of authority to the contrary, including the decision of our own court in Miller vs. Banking Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323. Besides, as above indicated, we think the statute of Georgia does give a lien which necessarily follows upon the relation of warehouseman that the company in this case sustained to the owner of these goods.

8. Counsel for plaintiff in error contend in the motion for a new trial, bill of exceptions, and also in the argument, that the Central had no right to retain the whole shipment for the payment of its charges, and that the question of reasonableness or unreasonableness of so doing was improperly withheld by the court from the jury. It was urged that the value of the coal on one car would have been amply sufficient to have met these charges, and that the other three should have been delivered at the place of destination. All four cars were delivered under one entire contract, and we think Section 2928 of the Civil Code upon the subject gives the right to retain possession of the entire property thus stored until the charges for such storage are paid. The case of Pennsylvania Steel Co. vs. Georgia Railroad & Banking Co., 94 Ga. 636, 21 S. E. 577, is cited in behalf of plaintiff in error as authority for their contention. In that case it appeared that the railroad company did not retain all the cars, but only a portion of them; and it was contended by the Pennsylvania Steel Company, that each

car constituted a separate shipment, and the amount due on each was readily ascertainable, and that defendant, in delivering the freight, departed from its general custom requiring cash before delivery. A demurrer to the declaration was sustained, which was affirmed by court. There is no indication whatever that the railroad company did not have an equal right to retain all the cars instead of a portion thereof. In 28 Am. & Eng. Enc. Law, pp. 663, 664, the author recognizes, as accompanying the lien of a warehouseman on property stored with him, the right to retain possession of the goods until satisfaction of the charges imposed upon them. Under that text, a number of authorities are cited. Morgan vs. Congdon, 4 N. Y. 552; Schmidt vs. Blood, 24 Am. Dec. 145; Barker vs. Brown, 138 Mass. 340. In view of the above principles, it is quite manifest that the claim of offset made by the plaintiff in error to the foreclosure of this lien was properly not submitted by the court to the jury. The demurrer or storage charges that had been running against the shipper in this case could have been readily prevented by paying the freight charges demanded by the carrier, and the unfortunate position in which the shipper was placed by such detention was the result of no legal wrong whatever done him by the carrier, but was caused by the shipper's failure to comply with the legal obligations under his contract. Of course, therefore, the shipper had no legal claim against the company for the detention of his property.

9. The motion for a new trial contains a large number of grounds not specifically set forth in this opinion. These grounds, about 35 or 40 in number, are sub-divided, many of them, into distinct points of law made thereon, making the several charges of error complained of amount in number to some 80 or 90. In the above treatment of this case, however, we think the principles enunciated cover every point worthy of any consideration whatever involved in the writ of error, and those decided are certainly controlling in this case. Applying these principles to the testimony introduced upon the trial, and our conclusion is that the evidence demanded the verdict. We will take this occasion to remark that, in the investigation of the principles of law controlling this case, we have been materially aided, and our work greatly facilitated, by the condensed, but thorough, brief of learned counsel for defendant in error. Judgment affirmed. All the justices concurring.

SUPREME COURT OF TENNESSEE, DECEMBER TERM, 1900.

PETER SWAN VS. LOUISVILLE & NASHVILLE RAILROAD COMPANY.

VOL. 20, A. & E. R. R. CASES.
NEW SERIES, P. 446.

OPINION BY WILKES, J., DELIVERED JANUARY 12, 1901.

This was a suit brought by Peter Swan against the Louisville and Nashville Railroad Company before a Justice of the Peace to recover the value of three (3) cars of Bedford Stone, which, it was alleged, the Louisville and Nashville Railroad Company had converted to its own use by refusing to deliver same upon the payment of the freight.

The proof showed that the cars of stone in question were shipped from Bedford, Ind., consigned to Peter Swan, Nashville, Tenn. The day they arrived in Nashville notice was given Mr. Swan of their arrival, and he was also notified to call and pay the freight thereon within forty-eight (48) hours or there would be car service charge of one dollar ($1.00) per day per car until the freight was paid. He did not call or offer to pay the freight until twenty-one dollars ($21.00) car service charges had accrued, the charges being at the rate of one dollar ($1.00) per car per day after forty-eight (48) hours free time had expired, excluding Sundays and legal holidays.

At the end of this period he paid the freight, but refused to pay any car service charges. The proof showed that Mr. Swan had a stone yard with a railroad track laid therein, which had been built by the N. C. & St. L. Ry., and which connected with the tracks of the Louisville and Nashville Railroad Company, but the Louisville and Nashville Railroad Company did not construct any part of the

side track nor own any part thereof. Mr. Swan's yard was enclosed by a fence, and there was a gate which could be closed across the track in question. It had been customary to deliver all cars consigned to Mr. Swan upon these tracks. The railroad company declined to deliver these cars upon his side track until he paid the freight, before the car service charges accrued, and further declined to put them upon his track upon his paying the freight after the car service had accrued, he refusing to pay the car service charge. He thereupon sued the railroad company for the value of the stone, with the freight added.

The proof showed that the cars in question were placed by the railroad company upon one of its own side tracks adjacent to Mr. Swan's yard, where they could be conveniently placed upon the tracks within his yard upon a few hours' notice.

The bill of lading under which the cars were shipped contained the following clauses:

"Clause 5—Property not removed by the person or party entitled to receive it, within 24 hours after its arrival at destination, may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost and there held subject to lien for all freight and other charges.

"The delivering carrier may make a reasonable charge per day for the detention of any vessel, or car, and for the use of the track after the car has been held 48 hours for unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor."

Clause 10—"The owner or consignee shall pay the freight at the rate hereon stated, and all other charges accruing on said property before delivery and according to the weights as ascertained by any carrier herein."

The plaintiff insisted that it was the duty of the railroad company to place the cars upon the side track in Mr. Swan's yard before it could demand payment of the freight or make any car service charge; and its refusal to place the cars upon the side track in his yard before payment of the freight was equivalent to a conversion of the stone. The plaintiff also contended that the railroad company had no right to make any car service charge, and that when he paid the freight he was entitled to the stone without payment of the car service charge.

The defendant contended that it was under no obligation to place the cars upon the side track within Mr. Swan's yard, the track belonging to another railroad company, until the freight had been paid; and further that the car service charge was reasonable and legal; that the railroad company had a legal right to charge for the detention of its cars beyond a certain reasonable time—48 hours; and that the regulation itself was reasonable and should be enforced, and that it had a lien therefor upon the freight.

The Circuit Court judge charged the jury in substance as follows:

That when the defendant company received this freight for transportation, it did so upon the terms and conditions stipulated in these bills of lading.

"When it delivered it to Nashville, the point of destination, that was the termination of its contract, that it was not necessary for it, for the completion of that contract, to deliver it into the yard of the plaintiff or upon the side track; but, before it could charge this demurrage, as claimed by defendant in this case, it must have had the cars and freight at a convenient point where it could have delivered them to the plaintiff at a reasonable and convenient place for unloading, before it could either demand the freight due thereon, or any demurrage, and being in that condition, prepared and ready upon payment of its freight, and whatever demurrage, if any, had accumulated; in the meantime the plaintiff was bound to have received the same and paid the freight and demurrage upon it. Now, the question being, in this case, for you to determine, is, as to whether or not the defendant has received that freight, whether they transported it to the City of Nashville, and whether it gave the plain-

tiff the required notice as stated to you, and whether it had the cars there ready to deliver them into the yards of the plaintiff, and where it was usual and customary for the delivering of freight for this plaintiff upon the payment of the legal charges upon it, which, as I stated to begin with, was the freight of so much, and the demurrage so much; and if the plaintiff has failed to receive it and unload it within the time stipulated within the contract of bill of lading.

"Now, as stated before, the plaintiff is insisting that the notice was not given; that the cars were not in condition to have been delivered to him; and, furthermore, he insists that the cars must have been delivered within his yard before they could demand the freight, and before any demurrage could have accumulated on them thereafter.

"The defendants say, on the other hand, that after the arrival of the cars and freight with it, defendant had given the notice required; that the plaintiff failed to come and pay the charges; to remove the same or to remove the freight; and that it had the cars there ready and at a convenient time and place after demanding the freight, to have switched the cars into the yard of the plaintiff:, which was a convenient and proper place for it, he was not required to switch into the yard of the plaintiff until these charges had been paid.

"The court instructs you that if the contention of the defendant is sustained by the proof, that the plaintiff could not recover in this case."

Under the charge of the court the jury found a verdict in favor of the defendants.

Plaintiffs appealed.

Upon the appeal to the Supreme Court, the plaintiff assigned error upon the charge of the court below, claiming that the charge was not the law. The Supreme Court affirmed the judgment of the court below, sustaining the charge of the lower court upon every point.

The points decided by the Supreme Court were as follows:

First—That the railroad company has a right to make a reasonable charge for the detention of its cars beyond a

certain reasonable time allowed for paying the freight, receiving and unloading the car.

Second—That it appears from the proof in this case, there being no proof to the contrary, that one dollar ($1.00) per day per car for the detention beyond 48 hours is a reasonable time.

Third—That under the contract set out in the bill of lading in this case, the railroad company has a lien for demurrage or car service charges.

Fourth—That the railroad company is not bound to deliver the cars upon the tracks in the private premises of the consignee, such tracks being owned by another railroad, until the freight has been paid: but that it is sufficient if the railroad company has the cars conveniently located so that they may be placed upon side tracks within a reasonable time after the freight and charges for which a lien may exist have been paid; and that, therefore, there was no conversion, and the defendant railroad company was not liable for the value of the stone.

STATE OF MISSOURI.
OFFICE OF THE RAILROAD AND WAREHOUSE COMMISSION.
CITY OF JEFFERSON, JUNE, 3, 1901.

IN THE MATTER OF THE COMPLAINT OF E. R. DARLINGTON & COMPANY VS. CENTRAL CAR SERVICE ASSOCIATION OF ST. LOUIS.

Hearing Held at St. Louis, May 16, 1901.

Complaint alleges that certain demurrage charges made by defendant on cars held on hold tracks of the Missouri Pacific Railway were illegal.

The evidence taken shows that certain cars of lumber consigned to complainant were placed on hold track on arrival at St. Louis, and due notice of such arrival, with request for orders concerning their disposition was given complainant in usual form, as follows:

> "You are hereby notified that the following cars are now on tracks at this station for your unloading or disposition, and that said cars are subject to a charge of $1.00 per day or fraction of a day for all time that they are held beyond the free time allowed by the rules of this Company."

Section 5 of Rule 2, Rules and Regulations of Central Car Service Association provides as follows:

> "Cars for loading or unloading shall be considered placed when such cars are held subject to the orders of consignors or consignees, or held for the payment of freight charges."

This rule was approved by this Board February 16th, 1900, in its finding in the case of the Brownell Car Company vs. Central Car Service Association. Forty-eight hours "free time" is allowed after placing cars for loading or unloading, after which a demurrage charge of $1.00 per day is made. This charge also has been approved by this Board as being reasonable.

Cars consigned to complainant having been held awaiting orders beyond the free time allowed by the Car Service Association rules, due notice of arrival having been given, demurrage was charged accordingly.

E. R. Darlington testified that he did not know personally that any cars were held, but perhaps his employes did, but they did not understand that car service was being charged on cars held beyond free time limit. The fact that Darlington & Co. were ignorant of this rule is not a sufficient plea for the non-payment of the charges. The enforcement of the rule referred to is absolutely necessary for the prompt transaction of the business of the railroads terminating at St. Louis. If otherwise, any manufacturer

or dealer could have cars consigned to them held indefinitely, awaiting such time as might best suit their convenience for delivery and unloading. Upon the prompt delivery and discharge of cars at destination depends in a great measure the very existence of any railroad handling a large traffic, and it is imperative that proper, reasonable rules regarding this most important matter should be made and enforced. The rule referred to is one of the most important governing the movement of cars after arrival at St. Louis, and certainly has had a very beneficial effect in improving car service and preventing blockades.

Mr. Darlington's evidence shows that the private track of Darlington & Co. has a capacity of five to six cars, according to length. Evidence taken shows that by the piling of lumber on each side of this track its capacity was reduced to three cars instead of five or six.

Parties having private tracks upon which they expect cars to be placed for loading or unloading should use every effort to keep such tracks clear, and in condition to be used to their full capacity, if occasion demands, in order that the prompt movement of cars can be assured. Promptness in delivery of cars by railroads, in accordance with the orders of consignees and prompt discharge of cars after receipt, is essential for the interest of all parties concerned.

In reference to the decisions of the Inter-State Commerce Commission (Nos. 617, 1075, 1076, 1088 and 1078) offered in evidence by Mr. E. R. Darlington, we do not see their application in the case under consideration.

In decision No. 617, it is held that the action of defendant (C. M. & S. P. Ry. Co.) in refusing to switch two cars of coal to a connecting line after payment of freight, and the offer of customary switching charges, unless complainant promised in advance to pay any demurrage charges which might be made, whether just or legally enforcible, was unjust

Decision No. 1075 holds that if demurrage charges are made to commence before the expiration of a reasonable time for loading or unloading, such action might be a violation of provisions of Section 1 of Inter-State Commerce Act.

Decision No. 1076 holds that the Inter-State Commission may find the time allowed for unloading or loading unlawful and forbid the charging of demurrage before the expiration of a reasonable time.

Decision 1077 orders that a defendant company cease and desist from charging demurrage until the expiration of a reasonable time for unloading after cars have been placed for unloading, and notice of such placing given to consignee.

Decision 1078 is simply explanatory of Section 1 of Inter-State Commerce Commission Act.

An order of this Commission made January 8, 1896, provides that cars arriving at destination on which there are no previous or general orders as regards delivery must be placed on hold track awaiting orders.

In the case under consideration the cars on which demurrage was charged were placed on hold tracks for orders, and Darlington & Co. were duly and promptly notified of such placing. After a reasonable time had expired, subsequent to notice given, no orders having been received, demurrage charges were made in accordance with the approved rules of the Car Service Association. There being nothing in the evidence heard in the matter showing any injustice in the demurrage charges claimed by the Car Service Association, we find that the demurrage charges of seventeen dollars against E. R. Darlington & Co., as made by the said Association, as shown by statements in evidence, are equitable and proper, and the case is, therefore, dismissed.

By order of the Board of R. R. & W. Commissioners.

(Signed) JAMES HARDING, Secretary.

SUPERIOR COURT, CATAWBA COUNTY, NORTH CAROLINA, JULY, 1901.

LATTA-MARTIN PUMP COMPANY
VS.
SOUTHERN RAILWAY COMPANY.

UNREPORTED.

Heard Before Judge Council.

This case involved question of the right of carriers to enforce warehouse charges for storage of freight. Shipment of pump cylinders arrived Hickory, N. C., June 27th, 1900, consigned to plaintiffs; notice was given on arrival of shipment, which was acknowledged, but for business reasons plaintiffs failed to remove said shipment until after forty-eight hours had expired, computed from noon day following date of arrival.

They demanded delivery without payment of storage charges, and tendered payment of freight charges only; delivery was withheld and shipment replevined. Case was heard before trial justice, who decided in favor of plaintiffs, and defendants appealed. Case was called in Superior Court, July Term, 1901.

Plaintiffs contended that defendants unlawfully detained property referred to in complaint for storage charges.

Defendant admitted possession and detention of the property, but alleged that detention was lawful, and that it was subject to storage or warehouse charges under its rules.

Under the evidence the Court charged the jury that the possession was lawful, that the property was subject to the charges referred to, and that said rules were reasonable.

Verdict for the defendant. Judgment upon verdict.

SUPREME COURT OF PENNSYLVANIA.
NO. 142, JANUARY, 1900.

201 PA. St. P. 624.
SUP. 51, ATL., 313.

PENNSYLVANIA RAILROAD COMPANY
VS.
THE MIDVALE STEEL COMPANY.

Appeal by Plaintiff from Judgment of Court of Common Pleas No. 4, Philadelphia County.

Opinion by Dean, Judge, February 24th, 1902.

The plaintiff, as a common carrier corporation, before 1893, adopted by its proper officers this rule:

"A charge of one dollar shall be imposed for car service for and upon each car carried over any portion of its line of railroad not unloaded by the consignee within forty-eight hours from the time said car arrived at the destination thereof, ready for delivery to such consignee, for each day or part of day after said forty-eight hours, not including Sundays and legal holidays, during which said car should remain unloaded, the said charge being payable by the consignee or person receiving the car."

From July, 1893, up to December, 1898, the defendant, which is a large iron and steel manufacturer at Nicetown, in Philadelphia County, received from plaintiff, consigned to the Steel Company, about fourteen thousand cars laden with iron, coal and other products used in its manufacturing business. A large number of these cars were detained beyond the forty-eight hours, some for many days, before being unloaded. Plaintiff charged for the delay as provided by the rule quoted, and presented monthly bills for the same to defendant, which it refused to pay. In an affidavit of defense it denied the right to make the charge, and consequently its liability to pay. Plaintiff then took a rule

to show cause why judgment should not be entered for want of a sufficient affidavit of defense. The aggregate of the charges within the years named was $4,048. The learned President Judge Arnold, of the Court below, in his opinion discharging the rule, says:

"Conceding that a carrier may charge a consignee a fixed rate in the nature of demurrage for the detention of its cars beyond a reasonable time for discharging their cargoes, and that the rate claimed in the present suit is a reasonable rate, yet there is sufficient denial of the facts upon which the plaintiff bases its claim to prevent the entry of a summary judgment, and therefore we discharge the rule for judgment for want of a sufficient affidavit of defense."

From this decree plaintiff brings this appeal, arguing that the Court erred in refusing to make the rule absolute.

The plaintiff has an unquestioned right as a common carrier to make reasonable rules to speed the unloading of its cars; cars are for the transportation of freight, not for its storage. A rule on its face may apparently be reasonable, either as to time allowed for unloading, or as to the extent of the penalty by which it is sought to enforce a reasonable time-limit; or the reasonableness of the rule may be doubtful; in either of which cases the evidence would be for the jury. But no such question arises here, for the affidavit does not deny the reasonableness of this rule as applicable to others; it only denies, on other grounds, the right of plaintiff to apply it to these shipments. Where the rule is manifestly a reasonable one, as this one is, both as to time and charge, the court will not take up time by instructing a jury to find the facts, any more than it would instruct a jury, on undisputed facts, to find that a collecting bank had protested a negotiable note within a reasonable time after non-payment. Although the question has not been heretofore directly passed upon by this Court, it has been decided in several of the states. (Miller vs. Mansfield, 112 Mass. 260; Norfolk Railroad Co. vs. Adams, 90 Va. 393; Wagon Co. vs. Ohio Railway Co., 98 Ky. 152, and other cases.)

As before noticed, with the plaintiff's statement is filed a complete copy of its account—giving car initials, number,, contents, exact hour of arrival, date of release, number of days detained and amount of charge. None of the

cars charged for were kept less than three days, and many of them from seven to twenty-one days. So far as it was in the power of a railroad company to give notice to a consignee of every material fact, the defendant got this notice from plaintiff when the bills were rendered. Wherein does the affidavit make an issue of fact which ought to go to a jury? It sets out that the demurrage rule is not applicable to it because large numbers of the cars consigned to it were unloaded promptly, but being re-loaded as outgoing shipments the detention caused by re-loading is embraced in a charge of delay in unloading. The plaintiff having sworn to its detailed statement, having positively averred the number, date of arrival and date of release as to every car, it was the duty of the defendant to meet this charge by specifying the cars detained for other reasons than by neglect to unload. The least error in plaintiff's account, whether overcharge as to delay, mistake in car, or consignment to defendant, when consigned to some other, could easily have been detected and exposed in the affidavit of defense; every delay occasioned, not by unloading but by reloading, could have been particularly averred. We do not say that if defendant had been unable to do this, either by neglect to keep accounts or by their loss or destruction, that the Court below might not, under the circumstances, have refrained from entering judgment. But the defendant makes no averment of inability to produce accounts which will specify the alleged errors in plaintiff's account; on the contrary, it avers that "the defendant will produce at the trial its own records, carefully prepared under a system adapted to prevent error, for the purpose of proving that the plaintiff's records are inadequate as a basis of claim." It thus asserts that it has in its possession accurate accounts, which at the trial in Court before a jury will defeat plaintiff's claim in part at least; yet, with seeming caution, it refrains from specifying the particulars then before it. This defeats the very purpose of the affidavit of defense law. Its object was to hasten final judgment by setting out in the affidavit the groundlessness of the whole or part of plaintiff's claim; or by averring that it had been paid and how, in whole or in part. The parties might then, in that early stage of the proceedings be brought together; the plaintiff might abandon his claim in whole or in part. This affidavit specifies nothing in answer to plaintiff's full and complete specifications.

Every averment is an inference from a "carefully prepared" system of bookkeeping of its own, without a copy of the particulars which would demonstrate the errors of plaintiff's charges. "The affidavit should state specifically and at length the nature and character of the defense relied on." (Bryer vs. Harrison, 37 Pa. 233. "The spirit of the affidavit of defense law abhors evasion and equivocation, and punishes them by entering judgment." (Endlich on Affidavits of Defense, Sec. 377; Woods vs. Watkins, 40 Pa. 458.)

The further objection to plaintiff's claim is, that it does not aver expressly or impliedly that these parties ever became parties to any contract for payment of demurrage on detained cars. But they were parties to the contract of shipment over plaintiff's railroad, and this is averred; and then, further, it is averred that since the demurrage rule was adopted it has formed part of the contract of shipment. This is sufficient averment of the implied contract. As a consignee of goods over plaintiff's railroad, it impliedly contracted to submit to all reasonable rules for the regulation of shipments. That the shipper was not consulted in framing the rules does not affect their validity. (Wagon Co. vs. Ohio Railway Co., supra.) There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying or rules for demurrage; as to the one, it cannot exceed a lawful rate; as to the other, it cannot exceed a reasonable charge. Within these bounds, it is presumed, in the interest of its stockholders and the public, to properly conduct its own business. The defendant further avers in its affidavit that "prior to 1893, or any time subsequent thereto," it had no knowledge that plaintiff had established a rule relating to the demurrage charges set forth in its statement, and that no notice of such rule was ever communicated prior to the bringing of this suit; but then it says: "At various times during the year 1893, and subsequently, bills have been rendered to the defendant by plaintiff for demurrage charges; but said bills did not contain notice of any regulation or rule on which said charges were or could be based, nor were the charges in said bills consistent with the terms of the regulations upon which the plaintiff has declared." This is inconsistent and evasive both in language and substance. That plaintiff did adopt such rule is clearly shown by its uniform charges.

It was not bound to serve a verbatim copy of the rule on defendant; that could have shown nothing so specifically as the charge, which plainly says what detention is allowed, what excess is charged, on what car and on what goods. And that defendant had full knowledge is shown by its own admission that bills for violation of the rule were regularly rendered. We think this affidavit falls short of what the law calls sufficient. It raises no issue of fact calling for the intervention of a jury, and the law is clearly with the plaintiff.

Therefore the decree discharging the rule is reversed, and the record is remitted to the Court below with directions to enter judgment for plaintiff, unless other legal or equitable cause be shown to the Court below why such judgment should not be entered.

ST. LOUIS COURT OF APPEALS.
OCTOBER TERM, 1902.

72 S. W. R., 122.

EVANS R. DARLINGTON, ET. AL., Respondents.

VS.

THE MISSOURI PACIFIC RAILWAY CO., Appellant.

No. 8617. Appeal from Circuit Court, City of St. Louis. Hon. Warwick Hough, Presiding.

STATEMENT.

"The plaintiffs claimed that on or about December 16th, 1901, the defendant, with force and arms, without leave, wrongfully seized, took and carried away certain of the goods and chattels of plaintiffs and converted the same to its own use against the peace of the State of Missouri and to the actual damage of plaintiffs in the sum of seven hundred dollars; that said taking was wrongful, by force, malicious and oppressive."

It was shown that the plaintiff was a lumber dealer, receiving freight on the siding of the Merchants' and Manufacturers' Railroad Warehouse Company, they having leased from said company the part of track that passed through their ground.

It was shown by the defendant that they had paid for the labor in building the track and also that they owned the approaches to the siding. That is, they owned the rail where it was on the right-of-way of the railroad and where it connected at each end with the railroad.

On December 16th, the plaintiff having previously paid the freight charges at the agent's office, the cars were placed on the siding by the Missouri Pacific employes and remained on the siding on December 17th and 18th, which was the free time allowed and were still on the track on December 19th, and car service having accrued the employe of the railroad demanded payment of $1.00 for each car, total $2.00, which claimant refused to pay.

First—Because the delivery was complete and the railroad had no right to take the lading, and because inclement weather prevented the unloading of the lumber from the car.

Payment having been refused, Missouri Pacific, through its employes, removed the car from the siding and unloaded the lumber in their warehouse, holding the lumber for the car service charges.

In the Circuit Court the question of the legality of the car service charge was not raised.

The judge allowing consideration only as to the removal of the car; that is: "That it was unlawful, wrongful, to forcibly take and carry away the property of the plaintiff, provided the evidence showed that the plaintiff had paid the freight charges to the defendant and had paid all other charges due up to the time of the placing of the cars, even if it was also found that car service, or demurrage as it is sometimes called, had accrued after delivery."

His instructions were for the value of the lumber and for punitive damages.

The court overruled the instructions of the defendant, who claimed authority under the promulgated car service rules to charge demurrage or storage after the expiration

of the free time, and that payment having been refused for said demurrage or storage, that the right to remove the cars from the switch remained with the defendant.

The jury returned a verdict seven hundred dollars actual damages, five hundred dollars punitive damages.

The defendant appealed to the St. Louis Court of Appeals with an exhaustive brief covering all the later decisions of the courts in Georgia, Kentucky, Massachusetts, Missouri, Virginia, etc., and to rulings of the Kansas Railroad Commissioners, Iowa Railroad Commissioners, and Missouri Railroad Commissioners.

It is the opinion of the court, C. C. Bland, Judge, "That the defendant had at least a license to move its engines upon the siding and that it never parted with its possession and control of the cars, as the switch was put in for the profit and convenience of the tenants of the M. and M. R. R. Warehouse Company, and also for the profit of the defendant railroad company and partly at its expense, and it could set in and take cars off the track consigned to the lessee or to the M. and M. Warehouse Company."

Baker vs. Railroad, 57 Mo. l. c., 272.

Dickson vs. Railroad, 67 S. W., 642.

Chiles vs. Wallace, 83 Mo., 85.

Gibson vs. St. L. Agricultural & Mechanics' Ass'n., 33 Mo. App. (St. L.), 165.

McAllister vs. Walker, 69 Mo. App. (St. L.), 476.

House vs. Montgomery, 19 Mo. App. (K. C.), 170.

Cook vs. Prigden, Stapler & Dunn, 45 Ga., 331.

Kirk vs. Hamilton, 102 U. S., 68.

Risien vs. Brown, 73 Texas, 135.

Campbell vs. Railroad, 110 Ind., 490.

The Evansville & Terre Haute R. R., et. al., vs. Nye, 113 Ind., 223.

Garrett vs. Bishop, 27 Oregon, 349.

"Second—The cars were switched on plaintiff's track to be unloaded. The plaintiffs, to accomplish this purpose, were, in a sense, in possession of both cars and contents, but the defendant did not lose its dominion over the cars or the lumber so long as the lumber remained in the cars.

"It retains the right to re-possess itself of the cars after they were unloaded and to re-possess itself of both cars and the lumber remaining in them for the purpose of enforcing any carrier's lien it may have had on the lumber existing when the cars were placed or any common law lien acquired after the cars were placed in the plaintiff's yards.

"It appears from the evidence that the defendant had knowledge of the existence of the car service rules. There was abundant evidence that plaintiffs impliedly agreed to be bound by these service rules. But, independent of any express or implied contract of plaintiffs to be bound by the rules, the modern doctrine in this country is that the right to demurrage, in such circumstances, exists independent of contract or statute. Section 1115, R. S. 1899.

"The opinion then quotes from opinion of Judge Toney, Chancellor, before whom the Kentucky Wagon Manufacturing Company case was first heard, as presenting a sound and logical demonstration of the necessity and reasonableness of the rule.

"Without the right of making and enforcing reasonable rules and regulations as to the delivery of freight and the detention of their cars by consignees, railroads would be at the mercy of individual shippers. Individual convenience should be subordinate to the public good, which demands expedition, regularity, uniformity, safety and facility in the movement of the freight, of the country which must of necessity be materially obstructed if individual consignees are allowed, without let or hindrance, to convert freight cars on their arrival with cargoes of freight, upon their side tracks, into warehouses for the storage of freight at the suggestion of their convenience or interest."

Hutchinson is quoted as follows:

"If the carrier had agreed to carry the goods to their destination and there deliver them within the prescribed time, he will be held to a strict performance of his contract, and no temporary obstruction or even absolute impossibility will be a defense for failure to comply with the agreement."

Hutchinson on Contracts, Sec. 317.

In Harrison vs. Mo. Pac. R. R. Co., 74 Mo., l. c., 371, the Supreme Court, speaking through Norton, Justice, said:

"Where a party by contract agrees to do a prescribed thing in a prescribed time, he is liable for non-performance of the contract, notwithstanding the fact that his non-fulfillment of the contract was occasioned by inevitable and unavoidable accident."

"To the same effect is

Galvin vs. Railroad, 21 M. A. (K. C.), 273.

Miller vs. Railroad, 62 M. A. (K. C.), 252.

Waters vs. Richmond & Danville R. Co., 16 L. R. A., 835.

Atkinson vs. Ritchie, 10 East, 530.

Wareham Back vs. Burt, 87 Mass., 113.

Nelson vs. Odiorne, 45 N. Y., 489.

Cutliff vs. McAnally, 88 Ala., 507.

Cassaday & Dunn vs. Clarke, 7 Ark., 123.

Ward vs. The Hudson River Bldg Co., 125 N. Y., 230.

"There are numerous other cases in support of this doctrine.

"The cases which seemingly announce a contrary doctrine will be found to be cases involving obligations where the thing to be done is one of duty and not of private contract; as in Ballentine vs. Mo. R. R., 40 Mo., 491; where it was held a carrier was excused for failing to deliver goods in a reasonable time on account of delays occasioned by an extraordinary snow storm.

"Our conclusion is that, under the pleadings and the evidence, the defendant was not guilty of trespass; that it had a right to take possession of the car shipped from Oregon, and to store the lumber remaining in the car until its demurrage charges were paid, but that it had no right to take the car and lumber therein shipped from Chippewa Falls, the time agreed upon in which it might be removed not having expired, and that its taking and retention of the

lumber was a conversion thereof to its own use and that plaintiffs, having paid the freight, are entitled to recover the market value of that lumber at St. Louis on the day it was taken by the defendant.

"The judgment is reversed, and the cause remanded.

"Barclay and Goode, JJ., concur; the former concurs in the result. "C. C. BLAND."

Note.—In the bill of lading of the Chippewa Falls car, as exhibited, the free time allowed was 72 hours. Missouri Pacific removed car from the siding before the expiration of the 72 hours.

UNITED STATES TREASURY DECISION.

(24431.)

LIEN.

A lien for demurrage or car detention, where it exists is embraced by Section 2981, Revised Statutes, as amended by Act of May 21, 1896, under the provision therein for "charges."

Washington, D. C.

Treasury Department, May 16, 1903.

Gentlemen:

The department duly received your letters of the 7th ultimo and 13th instant, wherein you request to be informed whether a lien against merchandise for car service or demurrage accruing after arrival of goods at destination, and while such goods are in customs custody, may be lawfully filed.

I have to inform you that the matter was referred to the Solicitor of the Treasury for an expression of his views on the subject, and that in a letter dated the 11th instant (copy inclosed) he states that, in his opinion, a lien for de-

murrage or car detention, where it exists, is embraced by Revised Statutes (Sec. 2981) as amended by the Act of May 21, 1896, under the provision therein for "charges."

Respectfully,

(3181) LESLIE M. SHAW, Secretary.

Edward Frohlich Glass Company, Detroit, Mich.

OPINION OF THE SOLICITOR OF THE TREASURY.

Department of Justice,

Office of the Solicitor of the Treasury,

Washington, D. C., May 11, 1903.

Sir: Assistant Secretary Armstrong, by reference of the 5th instant, indorsed on a communication from the Edward Frohlich Glass Company, of Detroit, Mich., requests my opinion upon the question "whether a lien against merchandise for car service or demurrage accruing after arrival of goods at destination, and while such goods are in customs custody, may be lawfully filed."

It does not appear whether the bill of lading in this case provided that the carrier should have a lien on the goods for demurrage.

There is a conflict of authority upon the question whether the law of demurrage applies to cases of car detention, and whether a lien for demurrage can be claimed where it is not provided for in the contract between the carrier and the shipper. (9 Am. and Eng. Encyc. of L., 2d ed., p. 262; Miller vs. Georgia Railroad Company, 88 Ga., 563; Chicago, etc., Railroad Company vs. Jenkins, 103 Ill., 588.) I do not consider it necessary to determine what may be the weight of authority upon these questions, for, assuming that a railroad company may lawfully claim such a lien, either under the law merchant or by virtue of its special contract with the shipper, and that such a lien exists in the particular case now under consideration, the Customs Regulations of 1899 (Art. 431) appear to deny to

the company the right to assert such lien against goods in customs custody, under Revised Statutes (Sec. 2981) as amended by the Act of May 21, 1896.

The provision of that statute, so far as pertinent to the present inquiry, is as follows:

"That whenever the collector of the port of entry, or other proper officer of the customs shall be duly notified in writing of the existence of a lien for freight charges, or contributions in general average he shall" * * *

The application of the words "freight" and "charges" as here used, is thus defined by Article 431 of the Customs Regulations of 1899:

"The freight which is specified in the above quoted Act is held to be the freight charged for the ocean transportation of the goods and the inland freight charged for delivering to an interior port goods covered by through bills of lading for such ports; the 'charges' specified therein are the charges incident to the shipment of the goods abroad, together with any charge assumed by the claimant of the lien in forwarding the same to the port of destination, and are not other charges accruing after the arrival of the goods in this country."

It may be that demurrage for car detention is properly a part of the "freight" referred to in the statute and the regulation, as there are respectable authorities for the proposition that demurrage is "extended freight" or compensation for the earnings improperly caused to be lost. (Sprague vs. West, 1 Abb. Adm., 548; Donaldson vs. McDowell, 1 Holmes, 290, 292; the J. E. Owen vs. 65,000 Bushels of Corn, 54 Fed. Rep., 185.) But this I need not determine, as I am clearly of the opinion that a lien for demurrage or for car detention, assuming such a lien to exist in the present case, is a lien for "charges" within the meaning of the amendment of May 21, 1896.

If by the language of Article 431 of the regulations of 1899 "other charges accruing after the arrival of the goods in this country" it is intended to exclude from the benefits of the Act an admitted lien in favor of the carrier for car detention accruing while the goods are in customs custody, I am of the opinion that the regulation is, to that extent, unwarranted by law. The statute plainly recognizes the

fact that there may be liabilities other than freight on the part of the shipper or consignee to the carrier, for which the latter is entitled to a lien on the goods, and it is this lien—a lien for "charges"—which the statute is designed to protect. I do not perceive upon what principle, or by what authority, the Treasury Department limits the application of the "lien for * * * charges" mentioned in the statute to charges accruing before the arrival of the goods in this country. If the carrier has a lien on the goods for his protection, it is of no consequence when the lien accrued. The statute was enacted to enforce the plainest sort of an equity, namely, that the right of the carrier to look to the goods for his protection should not be defeated by the loss of his control over the goods while in the customs custody.

The extension of the benefits of the Act to a lien for charges first occurs in the amendment of May 21, 1896. Shortly thereafter the Treasury Department promulgated its construction of the Act now embodied in Article 431 of the Regulations of 1899. (T. D. 17444, October 2, 1896.) That construction does not appear to have been founded upon any decision of the courts, nor upon the opinion of the Attorney General, nor other law officer of the government.

For the foregoing reasons I have to advise you that in my opinion a lien for demurrage or car detention, where it exists, is embraced by Revised Statutes (Sec. 2981) as amended by the Act of May 21, 1896.

Respectfully,

THE SECRETARY OF THE TREASURY,

MAURICE D. O'CONNELL, Solicitor.

CIRCUIT COURT, TAZEWELL COUNTY, ILL. SEPTEMBER, 1903.

UNREPORTED.

T. & H. SMITH & CO.

VS.

P. & P. U. RY. CO.

November 14th, 1901, the P. & P. U. Ry. Co. set two cars of lumber on team track at Pekin, Ill., consigned to T. & H. Smith & Co. As one of said cars was not entirely unloaded at the expiration of the forty-eight hours allowed free, and consignee refused to pay the car service charge due, agent removed the car which then contained about one wagonload and a half of flooring, and sent the lumber to a public storehouse. T. & H. Smith & Co. brought suit against the P. & P. U. Ry. Co. for $120.00, the value of the lumber withheld from delivery.

The case was tried before Judge George W. Brown, Circuit Judge, and a jury, at Pekin, Ill., Tuesday, September 22nd, 1903, the court instructing the jury to find for defendant.

A stipulation covering most of the facts was agreed to between opposing counsels, before the trial. Plaintiff contended:

First—That while forty-eight hours was possibly reasonable time in which to unload one car, it was unreasonable when more than one car arrived at the same time.

Second—That stipulations in bills of lading had no binding effect upon consignee unless he had assented thereto.

In instructing the jury to find in favor of the Railroad Company, the Court said:

"The courts in this state have held that railroad companies have the right to charge a reasonable amount for detention of their cars, after allowing a reasonable time for their unloading, assuming, of course, that consignee had

notice of the rule. This, I think, will not be disputed. I am also of the opinion that the laws of this state give railroad companies the right of lien upon such freight as lumber, and other bulk shipments, whether same be held in the car or in a warehouse, their duties as warehousemen being the same, whichever method of storing they may choose. The question here, independent of the contract, is, whether Smith & Co. had reasonable time in which to unload after arrival and notice. The contract signed by shipper is to the effect, and in specific terms, gives a lien for demurrage charges according to the custom of the place and the road where the shipment is delivered. There has been no evidence to show that Smith & Co. might not have put on more men and unloaded the cars in time. The evidence shows that they had help enough to unload one car at a time.

Gentlemen of the jury, you are instructed that under the law and the evidence, plaintiffs cannot recover, and the form of your verdict shall, therefore, be, 'We, the jury, find for the defendant.'"

Prettyman & Velde, attorneys for plaintiff; Stevens, Horton & Abbott, attorneys for defendant.

CIRCUIT COURT, SAINT JOSEPH COUNTY, IND. SEPTEMBER TERM, 1903.

UNREPORTED.

ISAIAH MILLER, ET. AL.

VS.

THE TERRE HAUTE & LOGANSPORT RAILWAY COMPANY, ET. AL.
NO. 9199.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

At the time the above entitled cause was submitted to the Court for trial, the plaintiffs and the defendant, The

Terre Haute & Logansport Railway Company, filed their written request that the Court find the facts specially, and state its conclusions of law thereon; and the Court, having heard the evidence, does now make its special finding of facts and state its conclusions of law thereon as follows:

STATEMENT OF FACTS.

1. During the month of March, 1903, and for more than a year prior thereto, and ever since, the defendant, The Terre Haute & Logansport Railway Company, was, has been, and is, a common carrier of freight engaged in operating a line of railroad terminating at the City of South Bend, Indiana, at which place it had and has a yard with side tracks, switches, and a freight house where freight transported over its railroad was and is delivered to persons entitled to receive the same.

During said month of March, the said defendant had a siding commonly known as a team track, long enough to accommodate from fifteen to seventeen freight cars when placed thereon for unloading purposes; and, during said time, it was said defendant's common practice and custom to place freight cars loaded with heavy freight, such as lumber, to be delivered in car load lots, upon said team track to be unloaded by parties entitled to the freight. The plaintiffs had full knowledge and notice of its practice and custom during said month of March, 1903, and before.

2. On February 27, 1903, the Mobile & Ohio Railroad Company received from one O. G. Huff at Case Siding, Alabama, one car load of yellow pine lumber, being the lumber described in the plaintiffs' complaint herein, to be transported over its line of railroad and connecting lines to South Bend, Indiana. Said lumber was loaded in a box car, No. 9202, and bearing the initials M. and O., and the same was consigned to said O. G. Huff, South Bend, Indiana. The car containing the lumber arrived over the railroad and in the yard of the defendant, The Terre Haute & Logansport Railway Company, at South Bend, at seven o'clock A. M. on March 19, 1903. On the same day and immediately after its arrival, the said O. G. Huff was notified of the arrival of the car by said defendant by postal card, and on the same day, he directed said defendant first

by telephone and then by postal card, to deliver the lumber contained in said car to the plaintiffs. Said car containing the lumber was placed on said team track, at a point where it was reasonably convenient and suitable for the plaintiffs to unload the same, by said defendant, for unloading at eight o'clock a. m. of March 20, 1903, and the plaintiffs had knowledge thereof at the time and of the order to deliver the lumber to them when given.

The plaintiffs did not unload said car within forty-eight hours, excluding Sunday, after seven o'clock a. m. of March 21, 1903. After seven o'clock a. m. of March 24, 1903, the defendant made out a bill for one dollar for the car service charge for the day beginning with seven o'clock a. m. of that day, and, by an employe presented the same at the business office of the plaintiffs at South Bend. This bill was not paid, and the plaintiffs' clerk, then in their office, and having authority so to do, informed the defendant's said employe that the plaintiffs would not pay said bill, and that they would not pay any car service charges. Thereafter, and on the same day, the defendant locked the car, and, upon demand of the plaintiffs made before the commencement of this suit, refused to deliver the lumber to them, unless they would pay the car service charges then accrued, being three dollars. The plaintiffs refused to pay said sum or any sum whatever as car service charges, and instituted this action. The plaintiffs fully paid the freight charges for transporting said lumber on March 26, 1903, and the same was taken from the defendant and delivered to the plaintiffs, under the writ issued and bond filed herein, on March 28, 1903.

3. The Court finds that the plaintiffs were the owners of said lumber described in their complaint from the time it arrived at South Bend, Indiana, on March 19, 1903, and until after it was delivered to them under the writ issued and their bond filed herein, and that, when it was replevined, its value was three hundred and seventy-five dollars; and, further, that the defendants refused to deliver up the lumber on demand, solely on the ground that car service charges had accrued to the railway company when the demand was made, and that it had a lien on the lumber for the amount of such charges, and the right to hold the same until the charges were paid.

4. On October 1, 1902, the defendant, the Railway Company, and all the other railroad companies having yards at South Bend, became members of the Central Car Service Association, and continued to be members thereof until April 1, 1903, when they all became members of the Indiana Car Service Association. The principal object of the various railroad companies that were and became members of said Central Car Service Association, in organizing and sustaining the same, was to adopt, promulgate, and enforce, through its agency, rules and regulations, that should apply to all companies, members thereof, alike, and to all their customers without discrimination, designed to prevent the unreasonable holding and detention of freight cars placed for loading and unloading on their tracks, by their customers; and to secure the prompt loading and unloading of freight cars used by them and the speedy clearing of their yards and tracks, and thereby secure the greatest possible use of their freight equipment for transporting purposes to the end that the shipping public might be well served and their own interest be promoted.

5. During the entire time from October 1, 1902, to April 1, 1903, the railroad companies, then members of the Central Car Service Association, and, particularly, this defendant, the Railway Company, had in force certain rules intended to accomplish the purposes above stated and which had been promulgated and which were well known to the plaintiffs during all of the months of February and March, 1903, of which the following are the ones and the only ones that are material to the issues in this cause, to wit:

"RULE 1.

Free Time Allowed for Loading or Unloading.

Sec. 3. On all commodities for unloading, except bituminous coal and grain, two days' free time will be allowed. Agents will charge car service after the expiration of forty-eight hours from 7 a. m. following placing.

Sec. 5. Cars for loading or unloading shall be considered placed when such cars are held subject to the orders of consignors or consignees or held for the payment of freight charges.

Sec. 6. After the expiration of the free time allowed, a charge of $1.00 per car per day or fraction thereof shall be made and collected upon all cars set for loading or unloading.

RULE 10.

Collection of Car Service.

Sec. 1. On all public deliveries, car service must be collected by the agent daily as it accrues. Where consignees or consignors refuse to pay, the agent must hold the car until payment is made; the regular charges being assessed until car is unloaded, or, at his option, he may direct the sending of such cars to public storage houses or yards, where the freight will be held subject to regular storage charges in addition to accruing car service and all other charges.

RULE 12.

Agents will be held responsible for the collection of car service charges on public tracks in exact accordance with placing and releasing."

And the Court finds that said rules were and are reasonable and that their enforcement was effective to accomplish the object designed thereby as hereinbefore found, and, particularly, that the interests of both the general shipping public and the railroad companies causing the same to be enforced were promoted thereby; and, further, that the free time allowed by said rules for unloading freight cars was reasonable, and that the charge of one dollar per day for the use of a freight car on track, after the lapse of the free time, was reasonable and less than the useable value of a freight car generally, and less than the useable value of the freight car in which was the plaintiffs' lumber at the time the same stood on the defendant's team track as hereinbefore found.

6. The Court further finds that, at the time said lumber was received by the Mobile & Ohio Railroad Company at Case Siding, Alabama, for shipment, it issued to the consignor, who was also the consignee named therein, one O. G. Huff, its bill of lading, which he sent to the plaintiffs, and which provides that said lumber should be transported

by said company and the forwarding lines with which it connects to South Bend, Indiana, and that the liability of the companies thereunder as carriers should terminate on the arrival of the lumber at the station of delivery, and that the companies should be liable as warehousemen only thereafter, and that the consignee should promptly receive and take away the lumber as soon as the same was ready for delivery, and, in the event that the consignee failed to receive and remove the freight within forty-eight hours after it was ready for delivery, he and the consignor agreed that the delivering carrier should be paid the sum of $2.00 per day for each and every day that the lumber remained in the car after the expiration of the forty-eight hours allowed for unloading, and that the same was the amount agreed on as liquidated and reasonable damages for the detention of the car per day, and that for the amount thus accruing, the delivering carrier should have a lien in addition to the common law lien for freight, charges and advances, and might detain said lumber or any part thereof for the payment of such damages as well as for other charges and advances.

Said bill of lading further provides as follows:

"Notice.—In accepting this contract, the shipper or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations and conditions."

The defendant, Railway Company, was the last and delivering carrier of said lumber.

7. At the time the demand was made by the plaintiffs for the lumber, three dollars for car service or damages as claimed by the Railway Company had accrued to it, and two dollars more accrued before the car was unloaded.

8. As to the defendant, John C. Edgeworth, the Court finds that he was the defendant Railway Company's station agent at South Bend, Indiana, during March, 1903, and, that, as such agent, it was his duty to collect the car service charges that might accrue to his principal and to assert its lien therefor on the property in its cars; and that he did endeavor to collect the car service charges and

damages on said car of lumber from the plaintiffs, and upon their refusal to pay the same, as hereinbefore found, he refused, on behalf of his principal, to deliver up the lumber, upon the ground solely that the said Railway Company had the right to hold the same for the payment of said charges.

CONCLUSIONS OF LAW.

Upon the foregoing facts found, the Court now states its conclusions of law as follows:

1. At the time the car load of yellow pine lumber described in the complaint was taken from the defendant, The Terre Haute & Logansport Railway Company, under the writ of replevin issued in this suit, the said defendant had and held a lien on the lumber for its car service charges or damages in the sum of five dollars then accrued to it, and was then and at the time the demand was made for the lumber and when this suit was commenced entitled to hold the possession of the lumber for the payment of its charges or damages, accrued to it at each of said times, and the plaintiffs, though the owners of said lumber, were not entitled to the possession thereof at the time this suit was commenced or when the same was delivered to them under the writ of replevin and bond issued and filed herein.

2. That the defendant, The Terre Haute & Logansport Railway Company, is entitled to the return of the lumber described in the complaint, the value of which is three hundred seventy-five dollars.

3. The law of the case is with the defendants and they are entitled to recover of the plaintiffs their costs; and the plaintiffs should take nothing by this action.

SUPREME COURT OF ILLINOIS.
OCTOBER TERM, A. D. 1903.

207 ILL. SUP., 199.

BOWEN W. SCHUMACHER, Appellant,

VS.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellee.

Appeal from Appellate Court, Second District.

SYLLABUS.

1. Railroads are quasi public corporations, and reasonable rules and regulations adopted by such corporations, conducive to the proper discharge of this public duty, should, where they are not in violation of some public law, be sustained.

2. The court reaffirms the doctrine that after the delivery of a car containing the freight, to the consignee, upon its own track, or at the place selected by him for unloading, if he have one, or to the consignee upon the company's usual and customary track for the discharge of freight, and a reasonable opportunity is given to the consignee to take the same, then as to such freight the railroad companies occupy the relation of warehouse men.

3. If cars in which freight is shipped, are the property of another railroad than that of the company transporting the same to the point of destination, such latter company bears the same relation to such cars as to the freight therein.

4. It is the duty of the consignee to take notice of the time of the arrival of freight shipped to him, and to be present, and to receive the same upon arrival, and he is not entitled to notice from the company that the same has arrived, but the company is authorized to store such freight and to be relieved of its duty as a common carrier.

5. When a railroad company, delivering freight at its point of destination, has no warehouse at that point, suitable for the storage of bulk freight in carload lots, and the property is of such character that the cars in which it is transported, furnish a proper and safe place for the same, said freight may properly be held in storage in the cars in which the same was carried.

6. The public interests require that cars should not be unreasonably detained.

7. The case of Jenkins vs. The Chicago & Northwestern Railway Company, 103 Ill., 588, does not apply in cases of this kind.

8. The free time allowed by car service rules for the removal of goods from a car, should not be dependent upon the distance the same may be hauled, or the number of teams employed in making delivery.

9. The object of the rule requiring a charge of $1.00 per car per day, for car service, is not so much for the recovery of revenue, as for the enforcement of a rule that is for the benefit of all shippers, and is thereby a public benefit. From the facts submitted to the court in this case, the charge of $1.00 per day is held to be a very reasonable charge.

10. The right of a railroad company to a lien for storage of car service charges that are reasonable is sutained.

The court in its conclusion said:

"The views above expressed as to the rules pertaining to such charges, whether regarded as railroad charges or demurrage or car service charges, seems to be in keeping with the weight of modern decisions upon the question, and, we believe, will tend to the public welfare."

ABSTRACT OF RECORD OF APPELLATE COURT.

Placita, April Term, 1903.

Order entered April 10, 1903, that cause be taken under advisement.

Judgment rendered June 8, 1903. Affirmed the judgment of the Circuit Court of Lake County in all things and that "the appellee recover of and from the appellant its costs by it in this behalf expended to be taxed, and that it have execution therefor."

On the 19th day of June, 1903, on petition of Bowen W. Schumacher praying for an appeal from the order and judgment of the Appellate Court to the Supreme Court, said Appellate Court certified that the cause involved questions of law of such importance on account of collateral interests that it should be passed upon by the Supreme Court, and order entered allowing the said Bowen W. Schumacher, appellant, an appeal to the Supreme Court from the said judgment of the Appellate Court, on condition that said appellant within twenty days from June 19, 1903, execute and file a bond in the penal sum of $250.

Appeal bond in the sum of $250, approved and filed June 24, 1903.

Certificate of the clerk of the Appellate Court to the transcript of the record in that court.

OCTOBER TERM, A. D., 1903.

BOWEN W. SCHUMACHER, Appellant.

vs.

CHICAGO & NORTHWESTERN RAILWAY CO., Appellee.

Appeal from Appellate Court, Second District.

ASSIGNMENT OF ERRORS.

And now comes the said Bowen W. Schumacher, appellant, by Louis Zimmerman, his attorney, and says that in the record and proceedings and in rendering the judgment aforesaid in the Appellate Court, there is manifest error in this, to wit:

First—Said Appellate Court erred in affirming the judgment of Lake County as follows: "Therefore, it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court that the said appellee recover of and from the said appellant its costs by it in this behalf expended to be taxed, and that it have execution therefor."

Second—Said Appellate Court erred in not reversing the judgment of the Circuit Court of Lake County and remanding the said cause to the court below for trial de novo.

Third—Said Appellate Court erred in not reversing the judgment of the Circuit Court of Lake County and rendering final judgment for the appellant that the right to the possession of the coke involved in this suit at the time of the commencement of this suit was in the appellant, together with the costs of suit.

Fourth—Said Appellate Court erred in rendering a judgment contrary to the evidence in the case.

Fifth—Said Appellate Court erred in rendering a judgment contrary to the law of the case.

By reason whereof the appellant, Bowen W. Schumacher, prays that the judgment of the said Appellate Court may be reversed and that judgment may be entered in his favor and against the appellee; or that such other proceedings may be taken as may be justified by the law and the evidence.

LOUIS ZIMMERMAN,
Attorney for Appellant.

OPINION OF APPELLATE COURT, SECOND DISTRICT.

Opinion by Judge George W. Brown, filed June 8, 1903.

This is an action of replevin instituted by appellant to recover from appellee possession of three tons of coke. The court at the conclusion of all the evidence directed a verdict for appellee and entered judgment thereon from which this appeal was prosecuted.

It appears from the record that Schumacher, a practicing lawyer in Chicago, resides in Highland Park, a village of two or three thousand inhabitants, on the line of the Chicago & Northwestern Railway, in Lake County. Schumacher shipped two carloads of coke from Chicago over appellee's line of railroad to his residence in Highland Park. Schumacher was promptly notified of the arrival of the cars, and that unless they were unloaded within forty-eight hours a demurrage or car service charge of $1.00 per day for each car would be charged after the expiration of such time. One car was promptly unloaded within thirty-six hours after the work of unloading was begun. The remaining car was not unloaded at the expiration of ten days after its arrival at Highland Park and notice to Schumacher, who worked for a week in an interrupted, indifferent and dilatory manner in attempting to unload the car, when the railroad company sealed the car and refused to permit him to remove more of the coke till the demurrage charges claimed by the company were paid. Schumacher thereupon instituted this replevin suit to recover possession of the coke.

The question presented for our determination is whether a railroad company under the laws of Illinois is entitled to a lien upon coke, coal or a like commodity, retained by the common carrier in its freight cars in which it is shipped, for reasonable charges for storage after the expiration of a reasonable length of time by the shipper to remove the same and failure on his part so to do.

The evidence warranted the court in assuming as a basis of its peremptory instruction that Schumacher did not unload the car within a reasonable length of time. The right of a railroad company to recover reasonable charges for the unreasonable detention of a car by a shipper is no longer an open question. Miller vs. Mansfield, 112 Mass., 260; Barker vs. Brown, 138 Mass., 340; Kentucky Wagon Co. vs. L. & N. R. R. Co., 50 Am. and Engl. Cases, 90; Miller vs. Georgia Railroad Company, 88 Ga., 563; Norfolk & Western R. R. Co. vs. Adams, 90 Va., 393; Kentucky Wagon Co. vs. O. & M. Ry. Co., 97 Ky., 32; Pennsylvania Co. vs. Midvale Steel Co., Pa. Sup., 51 Atl., 313; Elliott on Railroads, Vol. 4, Sec. 1567; Goff vs. Old Colony R. R. Co. (R. I.) 22 L. R. A., 532. A railroad company may after the expiration of a reasonable time to the shipper to re-

move the same, terminate its liability as a common carrier by unloading and storing freight in its warehouse, thereby assuming the liability of a warehouseman only, and have a lien for reasonable storage charges. I. C. R. R. Co. vs. Alexander, 20 Ill., 404; Porter vs. Railroad, 20 Ill., 407; M. D. T. Co. vs. Hallock, 64 Ill., 284; R. R. Co. vs. Friend, 64 Ill., 303; Anchor Line vs. Knowles, 66 Ill., 150; Rothschild vs. Railroad Co., 69 Ill., 164; Cahn vs. R. R. Co., 71 Ill., 96; M. D. T. Co. vs. Moore, 88 Ill., 136; Scheu vs. Benedict, 116 N. Y., 510. When the right to a lien exists, the same will not be defeated by the fact that the amount claimed may be too large, unless the owner or party desiring the possession of the goods makes a tender of the amount due. Russel vs. Koehler, 66 Ill., 459; Hoyt vs. Sprague, 61 Barb., 491; B. & L. H. Ry. Co. vs. Gordon, 16 U. C. L. B., 283; Lowenberg vs. A. & L. Ry. Co., 19 Southwestern, 1051; Schouler on Bailments, Sec. 125.

Where a party has a lawful lien on goods for storage although he may have delivered part of them without insisting upon the lien, nevertheless, he has a right to retain the residue for the amount due upon the whole. Lans. vs. O. C. & F. R. R. Co., 14 Gray, 143; M. H. & N. Co. vs. Campbell, 128 Mass., 104; Steinman vs. Wilkins, 7 W. & S., 466; McFarland vs. Wheeler, 26 Wendell, 467; Darlington vs. Missouri Pacific, St. Louis Ct. of Appeals, Southwestern Reporter, December, 1902.

It is well settled that a common carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them. And, we think, where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car, as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may in many cases be as effectual as any other.

Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself, or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier, and the goods stored elsewhere at the consignee's expense. And if a customer, whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car, by requesting or permitting the carrier to continue holding it unloaded in service, and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service. Miller vs. Georgia Railroad Company, 88 Georgia, 563.

In Miller vs. Mansfield, 112 Mass., 263, which was a case involving the relative rights of common carrier and shipper with reference to 100 barrels of flour, the court said:

"This charge is, in its essential character, a charge for storage. After the arrival of the goods at their destination the liability of the company as common carrier ceased, but they became liable for the custody of the goods as warehousemen, and, if they were not removed within a reasonable time, were entitled to compensation, for which they had a lien as warehousemen. * * * It is not material that the goods remained in the cars instead of being put in a storehouse. The responsibility of the company for their custody was the same as if they had been stored, and they had the right to retain them until their charges were paid."

And in Gregg vs. Ill. Cent. Ry. Co., 147 Ill., 550, it was held that the liability of a railroad company as a common carrier of freight ceased upon unloading the goods from the car at the place of destination and placing them in a safe or secure warehouse; and that where the carrier was not required, in the usual course of business, or expected, to remove the freight from the car, as in the case of grain in bulk, coal, lumber and the like, its liability as a common

carrier would terminate by delivering the car in a safe and convenient position for unloading, at the elevator, warehouse or other like place designated by the contract or required in the usage of business, or, if no place of delivery were designated or required on the said contract, in the usual and customary place for unloading by consignees; and that where the consignee of car lots of such commodities failed to receive the same or designate any place of delivery, the carrier would not be permitted to abandon the freight, but would be required to exercise ordinary and reasonable care for its preservation, as warehousemen; that in the exercise of such care the common carrier might leave the freight in the car or store it in a warehouse, assuming the liability imposed by law in such case for its care. The same case held in express terms that a common carrier, while it thus retained possession of freight committed to it for transportation, was entitled to a lien both for its charges as a common carrier and as warehousemen.

It is contended by appellant that the trial court erred in refusing to permit him to prove the distance required to haul the coke from the car of appellee to his place of residence. The testimony of appellant shows that his place of residence was within the corporate limits of the village of Highland Park. We hold that the rejection of this testimony was not reversible error. It cannot be held that different residents of the same village, like that in which appellant resided, can be entitled under circumstances precisely similar except the distance of their respective residences from the side tracks of the railroad, are entitled to materially different lengths of time for unloading car lots of coke, coal, lumber and other like commodities. If such were not the rule a person residing many miles distant from the village would be entitled to practically an unlimited length of time within which to unload a carload of similar freight. Such a rule cannot be declaratory of the law applicable to the case. The judgment of the Circuit Court is affirmed.

Affirmed.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

The form of the action and the nature of the pleadings are correctly stated in the brief of appellant.

As appellee does not feel, however, that the statement of facts as prepared by appellant is sufficiently full to enable this court to properly pass upon the questions involved in this case, the following statement of facts is submitted:

The cars in question arrived at Highland Park on June 20th, at about 7.30 o'clock a. m., and were placed upon the east team track where same were accessible for unloading from one side. On Saturday morning, June 21st, they were placed upon the west team track, where they remained until unloaded, and where they were accessible for unloading upon both sides (Abst., 10 and 11; Rec., 32½-35.) They were placed at the end of the switch track, and there was no interference with same thereafter by reason of any subsequent switching (Abst., 30; Rec., 65.) There was plenty of room to handle teams in unloading the cars, and there was no mud where the cars stood (Abst., 11; Rec., 35.)

John H. Arps, agent of appellee, mailed appellant a postal card about 9 o'clock on June 20th, notifying him of the arrival of the cars. A second postal card was mailed to appellant about noon on June 20th (Abst., 10, 11; Rec., 32½-33.) Appellant admits having received a postal card notice on the 21st, some time between half-past eight and nine o'clock. There was printed upon said postal card, among other things, the following:

> "All carload freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each twenty-four hours detention, or fractional part thereof, after the expiration of forty-eight hours from its arrival at destination. Jno. H. Arps, Agent."

Across the face of said postal card was stamped the following:

> "If this car is not unloaded within forty-eight hours from 7 K. A. M., June 21, 1902, a charge of $1.00 per day or fraction thereof, will be made for car service, for which this company reserves a lien upon the contents of car."

(Abst., 4; Rec., 23.)

Appellant admitted there was another notice which he thinks was at the house. He did not get it and had not seen it, but saw it afterward. Did not know whether the notice offered in evidence was the first or second notice sent (Abst., 8; Rec., 29½.)

Agent Arps saw appellant Friday morning, June 20th, and told him he had mailed a notice, and had the two cars of coke on the track, and that the cars should be unloaded Monday evening (Abst., 11; Rec., 33.)

Appellant did not pay freight charges until June 21st, when he gave his check upon the Bankers' National Bank for $19.63 (Abst., 4; Rec., 25.) At that time he received two receipts from the agent of appellee, upon both of which was the following notation:

> "If this car is not unloaded within forty-eight hours from 7 K. A. M., June 21, 1902, a charge of $1.00 per day or fraction thereof will be made for car service, for which this company reserves a lien upon the contents of car."

(Abst., 6; Rec., 26.)

At the time said receipts were given to appellant, he was advised by the agent of the appellee that in estimating time, Sunday would not be counted (Abst., 5; Rec., 25); and that the cars were ready for unloading (Abst., 5; Rec., 25½.)

Appellant arranged with Mr. Duffy to unload the cars, who commenced to unload on Monday morning, the 23rd. The first car was unloaded some time Tuesday forenoon, but the agent's books show same released as of Monday, June 23rd (Abst., 12; Rec., 35.) On Thursday, June 26th, appellee's agent stopped Duffy from unloading for two or three hours, at the expiration of which time the wife of appellant told the agent of appellee that she would personally pay the car service charges, whereupon the agent allowed Duffy to proceed with the unloading (Abst., 12; Rec., 36.) Having sent a messenger for the check promised by the wife of appellant, but not receiving same, agent of appellee on Friday, the 27th, again stopped Duffy for two or three hours, at the end of which time check was received and Duffy allowed to proceed with the unloading (Abst., 12, 13; Rec., 37.) The Saturday following, payment

was refused on the check when presented by agent of appellee, and he again stopped the unloading. A writ of replevin was then obtained by appellant. The second car was finally unloaded on Monday, June 30th, about 10 o'clock (Abst., 13; Rec., 37.)

A pamphlet was introduced in evidence and identified by Mr. Arps, agent of appellee, as being the car service rules adopted by the Chicago and Northwestern Railroad (Abst., 13; Rec., 37), by which he was governed in the application of car service at Highland Park. The rules were entitled as being the rules of the Chicago Car Service Association. Rules 2, 4 and 23 are as follows:

> "2. Forty-eight hours free time will be allowed for loading or unloading all cars, whether on public or private tracks, at the expiration of which time a charge of $1.00 per car per day, or fraction thereof, shall be made and collected, for the use of cars and tracks held for loading or unloading, or subject to the orders of consignors or consignees, or their agents.
>
> 4. In calculating time, Sundays and the following holidays are excepted: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas.
>
> 23. The manager of this association is authorized to entertain claims for relief from or refund of charges collected under these rules, based upon the following reasons:
>
> (a) That cars were bunched en route by the railroad company, and were not delivered in the order in which they were billed.
>
> (b) That cars were not placed for unloading in the order in which they arrived.
>
> (c) Condition of the weather.
>
> Such claims must show the character of the car and all particulars why cars cannot be loaded or unloaded within forty-eight hours." (Abst., 15; Rec., 40 and 41.)

The above rules apply uniformly over the district bounded on the east by Lake Michigan, and on the north, west and south by the Elgin, Joliet and Eastern Railroad (Abst., 20; Rec., 49.) All of the railroads within the territory above described, have the same car service rules (Abst., 19; Rec., 47.) These rules were in force at the time in question herein.

Appellant had knowledge of the car service rules, having had trouble with the agent of the appellee concerning their enforcement a year prior (Abst., 8, 9; Rec., 30), Mr. Arps having at that time referred him to the car service rules (Abst., 16; Rec. 42.)

It appeared from the undisputed evidence in the case that the Chicago Car Service Association was a joint agency of all of the railroads within the above described territory, created for the purpose of the uniform application and enforcement of car service rules within said territory. That the appellee company was one of the members of the Car Service Association. It also appeared that there are forty-two car service associations in the United States and Canada, all practically the same. That prior to the creation of the car service associations, detention of cars by consignees in Chicago would average somewhat like seven or eight days (Abst., 19; Rec., 48); that when the railroads attempted individually to correct these abuses in various ways, there was a want of uniformity in the methods and charges of the various railroads, and therefore much comparative discrimination (Abst., 20; Rec., 49.) That it was decided that the different railroads should appoint a joint agent to have exclusive charge of the application of car service rules, and there was given to the office of such agent, the title of the Chicago Car Service Association; that the application of the rules of the Car Service Association had increased the capacity of the railroads in the handling of carload business about 50 per cent. (Abst., 20; Rec. 49.)

It appeared from the evidence that the period of forty-eight hours allowed by the rules for unloading each of the cars of coke in question was reasonable. Mr. Arps, agent of appellee, stated that from his experience as agent at Highland Park, that cars of coke are easily unloaded inside of forty-eight hours after unloading has commenced (Abst., 17; Rec., 43.)

Mr. Sanford, manager of the Chicago Car Service Association, stated that about 7,500 cars of coal and coke arrived in Chicago each month; that only about seven per cent. of these cars were detained beyond the free time of forty-eight hours; that the records of all cars subject to car service rules for all the railroads centering in Chicago were kept in his office (Abst., 22; Rec., 51.)

Mr. Ira W. Johnson, superintendent for the unloading and ordering of coal and coke for Bunge Brothers, of Chicago, stated that from his experience it usually took from one and one-half to two days to unload a carload of coke; that about 90 per cent. of the cars loaded with coke, are unloaded within the prescribed limit of forty-eight hours (Abst., 28; Rec., 61.)

Mr. James H. Duffy, the teamster who unloaded the coke in question, and who appeared as a witness in behalf of the appellant, testified that two days would be a reasonable length of time to unload a car of coke of 50,200 pounds (this was the weight of the larger of the two cars in question.) (Abst., 34; Rec., 73.)

Theodore M. Clark, manager for the John Middleton Coal and Coke Company at Highland Park, and who also appeared as a witness for the appellant, testified that a carload of coke containing 25 tons, could be unloaded onto a wagon in two days. (Abst., 37.)

There is no dispute whatever as to the reasonableness of the charge of $1.00 per car per day. Mr. Sanford stated that car service was a charge made for the use of the car and the track upon which it stood, the responsibility and risk of the railroad in holding it, and the extra expense to which it was put incidentally in holding the car, because of liability to damage by switching, etc. (Abst., 21; Rec., 50.) Mr. Sanford further stated that from data taken from the annual reports of 29 railroads for the year 1901, that the average freight earnings per car per day of these 29 railroads was $2.42, and that the average earning per day of one of appellee's freight cars was $2.15 (Abst., 21; Rec., 51); that the maximum earning capacity of a freight car of the 29 railroads in question was $4.44 (Abst., 22; Rec., 51.)

Mr. W. P. Marsh, car service agent of the appellee company, whose duty it was to take the records of cars

and to make distribution of the car equipment of the appellee company, stated that the average daily earning of a freight car belonging to his company, was $2.15 per day. (Abst., 27.)

It further appeared from the evidence, that in shipments of this nature, consignees always unloaded the cars, and that the appellee company had no facilities at Highland Park for the storing of coal or coke (Abst., 17; Rec., 44.)

BRIEF.

The Right of a Railroad Company to Recover Charges for the Detention of Cars by Consignees Who Fail to Unload Within a Reasonable Period Is Thoroughly Established.

Miller vs. Mansfield, 112 Mass., 260.

Barker vs. Brown, 138 Mass., 340.

Kentucky Wagon Co. vs. L. & N. R. R. Co., 50 Am. and Eng. Cases, 90.

Miller vs. Georgia Railroad Co., 88 Georgia, 563.

Norfolk & Western R. R. Co. vs. Adams, 90 Va., 393; 18 S. E. R., 516.

Kentucky Wagon Co. vs. O. & M. Ry. Co., 97 Kentucky, 32, S. W. R., 595.

Pennsylvania Co. vs. Midvale Steel Co., Pa. Sup., 51, Atl., 313.

Scott vs. D., L. & W. R. R. Co., New York Sup. Ct., Mch. 12, 1894.

Elliot on Railroads, Vol. 4, Sec. 1567.

Goff vs. Old Colony R. R. Co. (R. I.), 22 L. R. A., 532.

Also the following unreported cases to the same effect:

Antrim vs. R. F. & P. R. R. Co., Law and Equity Ct., Richmond, Va., March 19, 1895.

Griffith vs. K. C., Ft. S. & M. R. R., Circuit Ct. of Jackson County, Mo., Feb., 1896.

Fuller vs. C., C., C. & St. L. Ry., Circuit Ct. Coles County, Ill., April, 1896.

Wabash R. R. Co. vs. Berry-Howe Coal Co., Circuit Ct. of St. Louis, June, 1896.

Blackmore vs. C., C., C. & St. L. Ry., Common Pleas, Hamilton County, O., Oct. 31, 1894.

P. & W. Ry Co. vs. Gilliland, Common Pleas, Butler County, Pa., September, 1892.

C., M. & St. P. Ry. Co. vs. Pioneer Fuel Co., District Ct., Woodbury County, Ia., January, 1902.

Purcell vs. P., C., C. & St. L., Cir. Ct. of Cook Co., Nov., 1893.

U. P. & D. G. R. R. Co. vs. Cook, District Ct., Arapahoe County, Colo., Mch. 25, 1892, 50 A. & E. R. R. Cases, 89.

Campbell vs. B. & O. R. R., Jefferson Cir. Ct., W. Va., Mch., 1893.

A railroad company may, in its discretion, either store goods in its own warehouse or store same in the car in which same were transported, where such car affords the proper storage facilities.

Miller vs. Mansfield, 112 Mass., 260.

Miller vs. Georgia Ry. Co., 88 Ga., 563.

Gregg vs. I. C. R. R. Co., 147 Ill., 550.

Wherever the question has been raised, the weight of authority is to the effect that railroad companies have a lien upon freight for damages which have accrued by reason of unnecessary and unreasonable delay of consignee in receiving and unloading, and that the railroad company may refuse to deliver such freight until the reasonable and established charges which have accrued for the detention and use of the cars containing such freight have been paid.

Ky. Wagon Co. vs. L. & N. R. R., 50 Am. and Eng. R. R. Cases, 90.

Miller vs. Mansfield, 112 Mass., 260.

Norway Plaines Co. vs. B. & M., 1 Gray, 263.

Miller vs. Georgia R. R. Co., 88 Ga., 563.

O. & M. R. R. vs. Bannon, Common Pleas, Louisville, Ky., June 20, 1892.

Purcell vs. P., C., C. & St. L. Ry., Cook County Cir. Ct., Nov., 1893.

Fuller vs. C., C., C. & St. L. Ry., Cir. Ct., Coles Co., Ill., April, 1896.

Darlington vs. Mo. Pac., 72 S. W., 122.

Elliot on Railroads, Vol. 4, Sec. 1567.

Goff vs. Old Colony R. R. (R. I.), 22 L. R. A., 532.

Campbell vs. B. & O. R. R., Jefferson Cir. Ct., W. Va., 1893.

U. P. R. R. vs. Cook, 50 Am. and Eng. R. R. Cases, 89.

A railroad company may terminate its liability as a common carrier by unloading and storing freight in its warehouse, thereby assuming the liability of a warehouseman only, and have a lien for all storage charges.

I. C. R. R. C. vs. Alexander, 20 Ill., 404.

Porter vs. Railroad, 20 Ill., 407.

M. D. T. Co. vs. Hallock, 64 Ill., 284.

R. R. Co. vs. Friend, 64 Ill., 303.

Anchor Line vs. Knowles, 66 Ill., 150.

Rothschild vs. Railroad Co., 69 Ill., 164.

Cahn vs. R. R. Co., 71 Ill., 96.

M. D. T. Co. vs. Moore, 88 Ill., 136.

Scheu vs. Benedict, 116 N. Y., 510.

When the right to a lien exists, the same will not be defeated by the fact that the amount claimed may be too large, unless the owner or party desiring the possession of the goods makes a tender of the amount due.

Russel vs. Koehler, 66 Ill., 459.

Hoyt vs. Sprague, 61 Barb., 491.

B. & L. H. Ry. Co. vs. Gordon, 16 U. C. L. B., 283.

Lowenberg vs. A. & L. Ry. Co., 19 Southwestern, 1051.

Schouler on Bailments, Sec. 125.

In this country demurrage, even in maritime law, exists aside from express contract, and the ship owner has a lien upon the cargo for unnecessary detention.

9 Am. & Eng. Ency. Law, p. 253, 2d Ed.

Porter on Bills of Lading, Sec. 356.

Hargood vs. 1,310 Tons of Coal, 21 Fed., 681.

Young vs. 140,000 Brick, 78 Fed., 149.

Whitehouse vs. Halstead, 90 Ill., 149.

The M. S. Bacon vs. E. & W. Trans. Co., 3 Fed., 344.

Trans. Co. vs. P. & R. Coal & Iron Co., 70 Fed., 268 (aff. C. C. of A., 77 Fed., 919.)

Railroad companies have a right to adopt rules for enforcing charges in the nature of demurrage for the unreasonable detention and use of cars for the storage of unloaded freight.

4 Elliott on Railroads, Sec. 1568.

Kentucky Wagon Co. vs. O. M. Ry. Co., 97 Ky. (32 S. W. Rep., 595.)

Miller vs. Mansfield, 112 Mass., 260.

Miller vs. Georgia R. R. Co., 88 Ga., 563.

Beach on Railway Law, Sec. 924.

U. P. & D. G. Ry. vs. Cook, 50 Am. and Eng. Cases, 89.

P. & W. Ry. Co. vs. Gilliland, Common Pleas, Butler Co., Pa., Sept., 1892.

Norfolk & Western R. R. vs. Adams (Va. Sup.), 18 S. E., 516.

Penn. R. R. Co. vs. Midvale Steel Co. (Pa.), 51 At. Rep., 313.

Where a defendant has lawfully a lien on goods for storage, although it may have delivered part of them without insisting upon the lien, nevertheless, it has a right to retain the residue of the shipment for the amount due upon the whole shipment, and the plaintiff cannot maintain replevin.

Lans vs. O. C. & F. R. R. Co., 14 Gray, 143.

M. H. & N. Co. vs. Campbell, 128 Mass., 104.

Steinman vs. Wilkins, 7 W & S., 466.

McFarland vs. Wheeler, 26 Wendell, 467.

Darlington vs. Missouri Pacific, 72 S. W., 122.

Schmidt vs. Blood, 9 Wend., 268, 24 Am., Dec., 143.

Railroad companies are compelled by the law of this state to furnish cars for the transportation of freight which may be offered by the public.

R. S. Ill., Ch. 114, Sec. 84.

A lien may exist by reason of an implied contract for the same.

Miller vs. Mansfield, 112 Mass., 260.

M. D. T. Co. vs. Moore, 88 Ill., 136.

I. C. R. R. vs. Alexander, 20 Ill., 23.

Darlington vs. Mo. Pac., 72 S. W., 122.

Barker vs. Brown, 138 Mass., 340.

Public policy demands that individual convenience should be subordinate to the public good, which requires expedition, regularity, uniformity, safety and facility in the movement of freight.

Miller vs. Georgia R. R., 88 Ga., 563.

N. & W. R. R. vs. Adams (Va.), 18 S. E., 763.

Kentucky Wagon Co. vs. L. & N. R. R., 50 A. & E. R. R. Case, 90.

Darlington vs. Mo. Pac. R. R., 72 S. W., 122.

Fuller vs. C., C., C. & St. L. Ry., Cir. Ct., Coles Co., Ill., Apr., 1896.

C., M. & St. P. Ry. Co. vs. Pioneer Fuel Co., Dist. Ct., Woodbury Co., Ia.

Griffith vs. K., C., Ft. S. & M. R. R., Cir. Ct. Jackson Co., Mo., Feb., 1896.

4 Elliott on R. R., Sec. 1567.

Car service, or demurrage rules, are recognized as being proper and lawful by the Federal Courts.

Interstate Commerce Commission vs. D., G. H. & M. Ry. Co., 17 Sup. Ct. R., 986.

Same vs. Same, 21 C. C. A., 103, 74 Fed., 803.

Am. Warehousemens Assn. vs. Ill. Cent. Ry. 7 Interstate Com. Rep. 556.

Pennsylvania Millers Assn. vs. P. & R. R. Co., 8 id., 531.

ARGUMENT.

The decision of the Appellate Court finds as a matter of fact, that the time allowed by the rules of the appellee company for the unloading of the coke from the cars was reasonable, and that the charge of one dollar per day made by the appellee for the use or detention of the car after the expiration of the free time allowed for unloading was reasonable. The only questions upon which this court is asked to pass are, therefore, ones of law.

It is claimed by the appellee in this case:

First—That after a reasonable time had been afforded appellant to unload the cars of coke in question, that the appellee had a right to make a charge known as a car service charge for the further detention of the cars by appellant.

Second—That the appellee was entitled to a lien upon the contents of said cars to secure such charge.

THE RIGHT TO MAKE THE CHARGE.

The charge which the appellee claimed that it had a right to make and enforce against the appellant, is neither a transportation or terminal charge, or a subterfuge for adding to the cost of transportation an amount in excess of the rate fixed by law; but is a charge, which, in its essential character, is a charge for storage. (Miller vs. Mansfield, 112 Mass., 260.) When the appellee company placed the cars in question upon its sidetrack at Highland Park, in a location accessible for unloading by the appel-

lant, and had waited a reasonable time for the appellant to unload same, it had then fulfilled its entire transportation contract as a common carrier. The consideration of the freight charges received by it covered no other or additional services. After the expiration of such reasonable time for the unloading of the cars in question, the liability of the railroad company as a common carrier ceased, and its liability as a warehouseman commenced.

In Interstate Commerce Com'n. vs. Detroit, G. H. & M. Ry. Co., 17 Sup. Ct. Rep., 986, the Supreme Court of the United States approved the conclusion of the Circuit Court of Appeals, which was that the railway transportation ends when the goods reach the terminus or station and are there unshipped, and that anything the company does afterward is a new and distinct service, not embraced in the contract for railway carriage. That a railroad company has a right to terminate its liability as a common carrier by unloading and storing freight in its warehouse, thereby assuming the liability of the warehouseman, and have a lien for all such warehouse charges, will not, we believe, be disputed.

There was no dispute in the evidence offered in this case as to the reasonableness of the time allowed by the rules of the appellee company for unloading the coke. The time allowed by the rules was forty-eight hours, Sundays and legal holidays not included. Furthermore, the forty-eight hours did not commence until seven o'clock a. m. of June 21, 1902, nearly twenty-four hours after appellant was advised of the arrival of the cars, at which time there was no reason why he might not have commenced unloading; so that instead of forty-eight hours, appellant had practically seventy-two hours within which to unload. As a matter of fact, the larger of said cars was not unloaded by appellant until about ten o'clock on Monday, June 30th, or more than 216 hours after same had been placed for unloading. If we deduct from the above, the time during which the unloading was stopped by the agent of appellee, it will still be more than 200 hours.

The conditions in railroading are very much different at the present time from what they were in 1872, at the time the facts involved in the Jenkins' case, cited by appellant, occurred, or even in 1882, when the decision in that case was rendered. Today, a very large percentage

of the freight handled by railroads is in the nature of bulky, heavy freight, and is shipped and carried by the railroads in carload lots. It is the custom between those shipping in carload lots, that same shall be loaded by the consignors, and unloaded by the consignees.

CARS AS WAREHOUSES.

It is the admitted law of this state, that a railroad company may terminate its liability as a carrier by unloading and storing the freight in either its own warehouse, or some other warehouse, and have a lien for all warehouse charges. As a matter of fact, a railroad car may be a suitable warehouse for many kinds of commodities. In Miller vs. Georgia Railroad Company, 88 Georgia, 563, the court says:

> "It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them. And, we think, where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car, as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may, in many cases, be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself, or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier, and the goods stored elsewhere at the consignee's expense. And, if a customer, whose duty it

is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car, by requesting or permitting the carrier to continue holding it unloaded in service, and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service."

Undoubtedly, in this case, it was to the convenience of the appellant that the coke be left in the car, rather than unloaded by the appellee and stored in some warehouse, were that possible; and, undoubtedly, it was to the advantage of the appellant that this coke remain in the car upon the tracks until such time as he was able to have same delivered direct from the car to his house, and also to the house of his friend, Mr. Towner, to whom a portion had been sold by appellant. But it appeared from the evidence that the storage of coke is not a common practice; that there were no warehouses for that purpose, and that the appellee, railroad company, had no facilities for the storing of the coke at Highland Park. Under the circumstances, there was nothing which the appellee could do, except to leave the coke in the cars upon the sidetrack, and considering the class of freight, it was a proper place in which to store the same. It might not have been a proper place to store paper, such as was the commodity mentioned in the Jenkins' case, but certainly it was a proper place for the storage of coke in bulk.

In Miller vs. Mansfield, 112 Mass., 260, the commodity was flour. The court said:

"It is not material that the goods remained in the cars, instead of being put into a storehouse."

In Gregg vs. I. C. R. R. Co., 147 Ill., 550, the commodity was corn. The court said:

"The railroad company was not required to keep the corn in its cars on track indefinitely, and although the consignee was in default in not receiving the

freight, after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as warehouseman. In the exercise of such care it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might, with the exercise of like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the owner, and thereby discharge itself from further liability."

In C. M. & St. P. Ry. Co. vs. Pioneer Fuel Company, District Court of Woodbury County, Iowa, the court, speaking of the use by the consignee of the cars of the railroad company, says:

"It will not be denied that the plaintiff could have unloaded its merchandise into its warehouses and not only have collected storage charges, but have acquired a lien therefor. Upon what theory can we distinguish between storing in warehouses and in equally well constructed buildings on wheels? * * * We think the carrier's duty ends with the transportation of the car and its delivery to the customer and no further service is embraced in the contract. The carrier, after a reasonable time has been allowed for unloading, is as much entitled to a charge for the further use of the car as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storing. There is no law which inhibits the use of cars for this purpose or which requires the unloading and removal of the goods to some other structure before any charge for storage can be made. Indeed, it may serve the customer's interest and convenience much better to have the car placed at its own place of business where he may unload it himself or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier and the goods stored elsewhere at the customer's expense."

On April 13, 1891, the Hon. George Hunt, Attorney General of the State of Illinois, delivered to the Board of Railroad and Warehouse Commissioners of this state, a written opinion, sustaining the right of a railroad company to make charge for an unnecessary and unusual detention of its cars. This opinion was given in complaint No. 64, Union Brewing Company of Peoria vs. C., B. & Q. R. R. Co., and complaint No. 71, Lyon & Scott vs. P. & P. U. R. R. Co. We quote the following language from the opinion of the attorney general:

> "Section 5 of the act in relation to receiving, carrying and delivering grain in this state provides that a consignee of grain, transported in bulk, shall have twenty-four hours, free of expense, after actual notice of arrival in which to remove the same from the cars of such railroad corporation. There would seem to be an implied right, under the statute, to charge for a longer detention than the twenty-four hours which the statute names. Indeed, no reason is perceived in law or justice, why an unreasonable and unnecessary detention of cars by consignees should not be paid for; and the Car service Association seems, from the proof before us, to be only an agency established to keep account of claims so arising and enforce them. The charges so made were thought to be reasonable, under all circumstances * * * Demurrage is an important subject which has arisen in a practical way only with late years, and long after our statute for the regulation of railroads was passed. It does not, however, follow that because there is no statutory regulation of the question there is no law."

Elliott, in his work on Railroads, Vol. 4, Section 1567, says:

> "It has been said that the right to demurrage exists only in maritime law and is confined to carriers by water. But while it is probably true that this right is derived by analogy from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, 'we see no satisfactory reason why carriers by railroads should not be entitled

to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea.' After a carrier has completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse and keeping them after the consignee has had a reasonable time in which to remove them. Why, then, when its duties as a carrier have been performed, and a reasonable time has elapsed, is it not as much entitled to additional compensation for the use of its cars and tracks as for the use of its warehouse? Certainly a customer whose duty it is to unload, or who unreasonably delays the unloading of a car for his own benefit, ought not to complain if he is made to pay a reasonable sum for the unreasonable delay caused by his own act. But this is not all. The public interests also require that cars should not be unreasonably detained in this way. Railroad companies as common carriers are 'bound to furnish cars for transportation of freight, and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless, and an incumbrance. If A be allowed to hold a car unloaded (or loaded) at his pleasure or convenience, without cost or charge, and thus deprive the railroad company of the use of its vehicles for transportation of the freight of B it is obvious that both the railroad company and the public will suffer injury. It is also well settled that common carriers may make reasonable rules and regulations for the convenient transaction of their business. It follows, from this line of reasoning, that railroad companies may adopt and enforce general rules, which are, or ought to be, known to their customers, making a reasonable charge for the unreasonable detention of their cars. In a number of cases a charge of one dollar a day for the detention of a car after the lapse of forty-eight hours, Sundays and legal holidays excepted, has been held not to be unreasonable as a matter of law. So, a charge of two dollars a day, after the lapse of twenty-four hours, has been enforced where the customer knew of the rule at the time the shipment was made."

The Rules of Appellant Were Necessary.

In order that railroads may properly perform their duties both to themselves and the public, it is necessary that they should formulate and enforce rules relative to the conditions upon which freight will be received and transported. Not only have they the right to adopt rules, but the law makes it an obligation that they do so, the only restriction being that the rules adopted must be reasonable.

The reasonableness of such rules and regulations, and the manner of their enforcement in a given case has, by some courts, been held to be a question of fact for the jury; but the better authority seems to be that if any fixed and permanent regulations are to be established it must be a question of law for the court to decide, since one jury in a given case might pronounce a given rule reasonable, while another jury in another case might decide the same rule to be unreasonable. Nor is there any objection, from a legal standpoint, that common carriers may employ, for the purpose of adopting and enforcing the rules, a joint agent. (4 Elliott on Railroads, Sec. 1568.)

The rules relative to the forty-eight hour limit of free time for unloading, and the charge of one dollar per day thereafter, are found by the Appellate Court from the evidence in this case to have been reasonable. It appeared that the charge of one dollar per day was less than one-half of the average daily earnings of the freight cars of the appellee for the last year, and considerably less than one-half of the average daily earnings per car per day of twenty-nine of the largest railroads in the country. The object of these rules was not that the railroad company might derive profit from the use of its cars as storehouses, but that consignees might be induced by reason of these rules to promptly unload the cars, and thereby permit the railroad company to again take same into its service where they were more than twice the value than when standing upon a side track and used merely as a storehouse.

In Miller vs. Georgia Railroad Co., 88 Ga., 563, the court, speaking of a similar rule, said:

> "The rule in question, we think, falls clearly within the scope and power of the common carrier to adopt

and enforce any reasonable regulation for the conduct of its business, the purpose and effect of which is the protection of the carrier and the benefit of the public. It seeks to prevent diversion and detention of cars from the legitimate work of transportation, as well as secure compensation for services not otherwise paid for, by prescribing, in cases where, by contract, or custom, the carrier is under no duty to unload the cars, but they are to be unloaded by the customer, a rate per diem, in the nature of a charge for storage, to begin after the cars have been delivered to the customer or placed at his disposal for unloading; and such a regulation cannot be regarded as unreasonable, so long as a reasonable time is allowed for unloading, and so long as the charge for the use of the cars beyond that time is not excessive. The law compels the carrier to receive the goods of the public and to transport and deliver them within a reasonable time. To do this, it is necessary that the means of transportation shall be under the carrier's control, and that, after the duty of carriage has been performed, its vehicles shall not be converted into freight houses at the will of consignees, to remain such indefinitely, and without compensation. If no check could be placed upon such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers thus hampered in their facilities, and unable to foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic, or perform with dispatch their legitimate function. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freights, thus requiring it to provide extra facilities, as well as to render extra service, without compensation beyond that received for transportation. It would result in the accumulation of cars on the carrier's tracks, and the obstruction in a greater or less degree of the movement and unloading of trains."

In P. & W. Ry. Co. vs. Gilliland, Common Pleas, Butler County, Pennsylvania, the court said:

"We can conceive of no more necessary or reasonable regulation than the one we are asked to enforce.

The need of such a regulation is apparent from the facts in this case. The rules adopted in this district are reasonable and clearly necessary, and in no way detrimental to shippers, but wholly in their interest. The common carrier is compelled to accept goods for transportation, and it would be manifestly unjust to not enforce a corresponding duty on the shipper, to not negligently and unnecessarily detain or otherwise deprive the common carrier of the use of the vehicles which the law thus places at his command."

In N. & W. R. R. R. Co. vs. Adams (Va. S. C.), 18 S. E. Rep., 673, it was said:

"The railroad company, as a common carrier, is bound to furnish cars for transportation of freight; and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless and an incumbrance. * * * It is well settled in this state and in other states, that a common carrier may make reasonable rules and regulations for the convenient transaction of business between itself and those dealing with it, either as passengers or as shippers; that this rule (referring to the car service rules) is reasonable and proper has been decided in a number of states."

IT IS NECESSARY THAT THE RULES BE GENERAL IN THEIR APPLICATION.

It appeared from the evidence in this case that within the territory embraced in what is known as the Chicago Car Service territory, but one set of car service rules are used by all of the railroads operating within that territory. The application of these rules is thus made uniform, and discrimination, which would be unlawful, is obviated. Furthermore, the enforcement of the rules in question is left in the hands of the car service manager, who is not the representative of any one railroad, but is equally responsible to and the representative of all the roads in the association. It thus follows that the construction put upon the various rules in their enforcement by the several rail-

roads must, necessarily, be the same. We cannot conceive of an arrangement which it would be better to adopt, and which, at the same time, would protect both the interests of the railroads, the interests of the shippers and consignees and the interests of the public at large.

In Kentucky Wagon Co. vs. L. & N. R. R. Co., 50 Am. & Eng. R. R. Cas., 90, Judge Toney said:

> "No one consignee, if the rule be a reasonable one, in its application to all shippers, in the ordinary conduct of traffic business, has the right to advance the peculiar, rare and exceptional circumstances of his particular case to justify his violation of the rule or establish a common carrier's liability for not relaxing it as to him. Shippers and consignees must adjust the possible exigencies of their business in dealing with a common carrier, whose functions, as we shall hereafter see, are of a quasi public character, affecting the general shipping interests of the country, to the general, ordinary, reasonable rules of traffic, adopted by common carriers, for the convenience and benefit of all alike."

In Darlington vs. Missouri Pacific Railway Company, 72 Southwestern, 126, the court says:

> "In order to fulfill the chief end of their creation, viz.: the service of the public as common carriers, they should be left free to establish general and reasonable rules and regulations governing the delivery of freight and charges for the unnecessary or unreasonable detention of their cars by consignees. It is a matter of the highest public interest that they should be accorded this right and power. Individual convenience should be subordinate to the public good, which demands expedition, regularity, uniformity, safety and facility in the movement of the freight of the country, which must of necessity be materially obstructed if individual consignees are allowed, without let or hindrance, to convert freight cars on their arrival with cargoes of freight upon their side-tracks into warehouses for the storage of freight at the suggestion of their convenience or interest."

PUBLIC POLICY REQUIRES THAT THE RIGHT OF LIEN BE GIVEN.

Railroads, being quasi public corporations, receiving their rights and franchises from the public, are under certain obligations to the public which they must perform. The innumerable ramifications of the combined railroad systems extend to every nook and corner of this country, and the loaded cars of almost any railroad may be found, at one time or another, upon the switches or sidetracks of nearly every city of any commercial importance on the continent. They are transferred from one carrier to another until their final destination is reached. This is in the interest of commerce. It facilitates and lessens the expense of commerce and transportation.

In Griffith vs. K. C., Ft. S. & M. R. R. Co. (C. C. of Jackson Co., 1896), the court, stating the obligation of the railroads to the public, said:

> "A railroad cannot meet the ordinary demands of transportation if its cars can be tied up indefinitely at the pleasure of the individual shippers. The individual shippers and the company are not the only ones interested. The public convenience and trade would be seriously interfered with if each individual shipper were permitted to retain the use of cars and tracks for storage purposes beyond a reasonable time. 'Car famines' and consequently congestion of traffic would inevitably result from such a rule."

In Fuller vs. C., C., C. & St. L. R. R. Co. (Cir. Ct. of Coles County, Illinois), Judge Wright said:

> "The principal object of the rule of the company doubtless is not to secure the small charges made for the use of cars, but to secure to themselves, and to the public, the use of the cars."

In Miller vs. Georgia Railroad, supra, the court, in commenting upon the effect upon the public, where consignees were allowed to retain cars to be unloaded at their pleasure, said:

> "Not only would loss ensue to the carrier, but consignees in general and the public at large must suffer

seriously from this hindrance to the due and regular course of transportation. In this matter the public have rights paramount to those of any individual shipper or class of individuals, and the business of the common carrier must be so conducted so as to subserve the general interest and convenience. Especially is this true as to railroads in view of the important franchises granted to them by the public, and the use of control thus acquired of highways on which the commerce of the country is so largely dependent."

In C., M. & St. P. Ry. Co. vs. Pioneer Fuel Company, supra, the court said:

"But there are other considerations in regard to railroads. If its vehicles can thus be indefinitely tied up and converted into warehouses, it will take twice or three times the number of cars to accomplish the work of transportation, and increased trackage and terminal facilities in proportion. This would necessitate a large and unnecessary increase of the capital invested and a corresponding increase of freight charges, and thus the rights of the public to an economical service would be violated. If the rule contended for by defendants shall obtain, no reasonable man will expect the railroad company to provide the additional rolling stock and terminal facilities for nothing, and if the parties who render the same necessary and who get the use of the extra cars and trackage cannot be made to pay for the same the general public will have to do so in increased freight rates."

In N. & W. R. R. vs. Adams (Va.), 18 S. E. Rep., 763, speaking upon this subject, the court said:

"If A be allowed to hold a car unloaded at his pleasure or convenience, without cost or charge, and thus deprive the railroad company of the use of its vehicle for transportation of the freight of B, it is evident that both the railroad company and the shipping public will suffer injury. * * * The evidence in the record is that the use of the car is much more valuable to the company than the charge of one dollar per day; and it is manifest that, if cars can be delayed and held by shippers or consignees for months (as the record

shows was done in this case, in some instances), without any regulation that would be operative, the business of the railroad and the public service must necessarily suffer."

In Kentucky Wagon Co. vs. L. & N. R. R. Co., supra, it is said:

"It is important to the proper discharge of its duty to the public that it (the railroad company) should not be disturbed by any special consignee or set of consignees by the wrongful withdrawal of its rolling stock from its main lines, to subserve their private convenience or interest. It is important, in order that the railroad common carriers may always know, with certainty, their own capacity for meeting the customary demands of traffic along their lines, and of that coming to them from other lines. How can these important conditions be supplied or exist if the amount of rolling stock at the command of the railroad common carriers of the country must always depend upon the peculiar business exigencies of individual consignees who may find it either convenient or profitable to convert freight cars, when once they have them upon their own side-tracks, into warehouses."

In Darlington vs. Mo. Pac. R. R. Co. (St. L. Ct. of App.), S. W. Rep., Feb., 1903, the court says:

"Without the right of making and enforcing reasonable rules and regulations as to the delivery of freight and the detention of cars by consignees, railroads would be at the mercy of individual shippers. Individual convenience should be subordinate to the public good, which demands expedition, regularity, uniformity, safety and facility in the movement of the freight of the country which must necessarily be materially obstructed if individual consignees are allowed, without let or hindrance, to convert freight cars on their arrival with cargoes of freight, upon their side-tracks, into warehouses for the storage of freight at the suggestion of their convenience or interest. As we have seen, railroads are a public necessity, the general welfare of the country being dependent upon their untrammeled interconnection and un-

trammeled liberty to accomplish the legitimate public purposes of their organization. Promptness, regularity and safety in the transportation of passengers and freight are essential requisites to the successful administration of the railroad common carrier's system of the country. These characteristics or qualities are demanded by the public interest. Regularity and system in the movement of their cars, in the handling of freight, both in receiving, transporting and delivering it, so that the public can know what to expect and what it can depend upon, are demanded of railroads by law and by public policy. But how can this be expected of railroads if their rolling stock may be tied up and water-logged upon the private side-tracks and switches of private consignees to serve as store-rooms and warehouses for their freight, without any power on the part of the railroad companies to enforce reasonable rules against such consignees, requiring diligence in the unloading and re-delivery of their cars. These public carriers rely upon the rolling stock to meet the demands of the volume of business which they have to carry. How can they insure to consignees and shippers in general and to the public that facility of commercial interchange which they are required to afford both by charters and by public law? How can they furnish cars and transportation to shippers in general, and discharge the volume of traffic business of their respective systems, if their rolling stock can be locked up in the private yards of special consignees? How can such carriers know with any reasonable degree of certainty whether their rolling stock at any given time is or will be fully up to the demands of the business along their lines? Promptness, uniformity and safety in the railroad traffic business of the country can only be secured by the adoption and strict enforcement by railroad companies of uniform and reasonable rules and regulations, which shall be binding upon all shippers and consignees alike, with reference to the reception, transportation and delivery of freight."

IMPLIED CONTRACT FOR A LIEN.

Appellant, in his brief, takes the position that in this

state a railroad company can acquire a lien upon freigh. to secure the payment of car service charges only when a provision of the statute gives it that right, or where there is an express agreement therefor between the railroad and the owner against whose property it is sought to enforce such lien, and cites in support of his position the case of C. & N. W. Ry. Co. vs. Jenkins, 103 Ill., 588.

The position taken by appellant herein is not supported by the Jenkins case, as the language in that case is as follows:

> "Where the law gives no lien, neither party can create it without the consent or agreement of the other."

This is, no doubt, correct. While it is true that in the Jenkins case, the court decided that under the facts in that case, the law gave no lien, still, as we will hereinafter endeavor to show, the court, in rendering its opinion in that case, was guided by its belief that the maritime law gave no right to a lien for demurrage, except as the same was expressly stated in the contract of affreightment. In this particular it appears from the cases of Hawgood vs. 1310 Tons of Coal, 21 Fed. Rep., and the other cases cited by us, that the right to demurrage does exist at common law, irrespective of whether or not a stipulation for the same expressly appears in the contract of affreightment.

As heretofore stated, the conditions surrounding commerce, and especially the railroad branch of commerce, have changed much in the last few years, and many elements, heretofore unknown, have been introduced. It appears from the evidence herein, and it is also a matter of common knowledge, that railroads frequently have suffered much from the wrongful and unnecessary detention of their cars and the use of the same and the tracks upon upon which they stand, for storage purposes. This is, no doubt, due partly to the rush and growth of business, but also largely to the policy of consignees in failing to provide yard room and warehouses, and to the fact that they find it easier and cheaper to keep goods stored in cars than to unload same into warehouses, and then re-handle a second time. This is an abuse with which the railroads have been struggling for years, and while willing, as is shown by the reasonableness of the rules and regulations intro-

duced herein, to give the amplest time for the unloading of cars, they have been, so far, unable to prevent this obstruction to their business, except by making a charge of a nominal sum per day for such detention and endeavoring to collect the same.

This condition of affairs is so well known that this court may almost take judicial knowledge of the same, and it is asked to meet and deal with these comparatively new conditions in railroad transportation, not in any narrow or technical spirit, nor in accordance with any rigid or technical rules which may have been established before railroads existed, or while they were yet in their infancy, or which may have been established, as in the Jenkins case, to meet the requirements of water navigation, but to meet the same in the spirit of Chief Justice Shaw, in the opinion given by him in the Norway Plains vs. B. & M. R. R. Co., 1 Gray, 263, in which he says:

> "The liability of carriers of goods by railroads, the grounds and precise extent and limits of their responsibility, are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation by ships, lighters and canal boats by water, and in others like that by wagons on land; but in some respects it differs from both. Though the practice is new, the law, by which the rights and obligations of owners, consignees and of the carriers themselves, are to be governed, is old and well established. It is one of the great merits and advantages of the common law that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail when the practice and course of business to which they apply should cease or change; the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific and adapted to practical use by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course

of judicial proceedings by tribunals to the highest authority, the general rule has been modified, limited and applied according to particular cases; such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances.

"The effect of this expansive and comprehensive character of the common law is, that whilst it has its foundation in the principles of equity, natural justice, and that general convenience which is public policy, although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases of daily occurrence, in the business of an active community, yet the rules of common law, so far as cases have arisen and practices actually grown up, are rendered in a good degree precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grew out of those circumstances. The consequence of this state of law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; general considerations of reason, justice and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations to the new circumstances."

There are many instances where the common law gives or allows a lien in cases where no specific agreement for the same exists, such as the liens of inn-keepers, agisters, carriers, bailees and warehousemen.

Whoever uses the property of another must expect to pay whatever that use is reasonably worth, and it would be a great hardship for railroads to be compelled to leave their cars upon side-tracks and in the possession of con-

signees until the latter saw fit to unload and release them, and were not permitted to collect a reasonable charge therefor. But in order to collect these charges, which are due in many cases from irresponsible consignees, the railroads claim the right to demand that payment be made of all charges which have accrued before they permit the cars to be unloaded. In other words, they claim a lien upon the contents of the car, not only for the freight, but for any car service charges which may have accrued up to the time the consignee signifies a willingness to unload.

It is a well known fact that the sale and transfer of property, by assignment of the bill of lading, while en-route, in carload lots, is a matter of everyday occurrence. The railroad company which accepts a car of coal or coke at Pittsburg, cannot with any certainty know the final destination of the car in question. And if a railroad company is to be protected from abuse by consignees in the unlawful detention of cars for unnecessary lengths of time, it is not sufficient that the company may have the right to sue the final owner in assumpsit. It must, in addition, have the benefit of the warehouseman's lien for the service which it has rendered as a warehouseman. A suit in assumpsit would, many times, be absolutely unavailing, for the reason that judgments rendered could not be collected on account of the insolvency or irresponsibility of the judgment debtor.

The life of a railroad company is naturally in its rolling stock. If the company is deprived of the use of its cars, the vast amounts of money invested in the purchase of right of way, the maintenance of track, the building and operation of locomotives, and the necessary machine shops for repairing the same, is made unremunerative; and the shipping public will have to pay higher rates of traffic if one-half of the freight cars of our railroads are needlessly detained—idle upon side-tracks.

It appeared from the evidence in this case that appellant was familiar with the rules of appellee to the effect that a charge would be made for the detention of the cars longer than the free time allowed by the rules, and that a lien would be claimed upon the contents of the cars to secure such charge. Such rule being known to appellee, and not being unreasonable, it will be presumed that he agreed to be bound by same when he detained the car an unreasonable length of time.

If the appellee herein is correct in its contention that after the expiration of a reasonable time, within which to unload cars, its liability as a carrier ceases, and that of warehouseman begins, and as it is admitted that if the railroad company were to transfer the contents of the car in question to a warehouse owned by itself, it would be entitled to charge compensation therefor, and have a lien to secure such compensation, we can see no reason why it is not entitled to a lien when its cars are used as warehouses. And this, particularly in view of the decision of our Supreme Court in Gregg vs. I. C. R. R. Co., supra, to the effect that for many classes of freight a car may be as suitable a warehouse as any other.

In Griffith vs. K. C. & Ft. S. R. R. Co., supra, the court said:

> "The shipper, by his failure or neglect to receive and unload the cargo, compels the railroad company to retain, house and care for his goods beyond the time, when by the terms of the contract of carriage they are bound to do so. For this extra service the railroad company is entitled to compensation. If the car is unloaded and the goods placed in a warehouse the company has an undoubted lien for such extra compensation. Now, under the rule of the company, of which the shipper has notice, the car is made the storage house for the goods after a reasonable time has been given the shipper to unload. Is not this rule and the knowledge thereof on the part of the shipper equivalent to an agreement on the part of both parties that the goods shall be considered 'stored' in the car, the same as if in a warehouse, and if so, does not the lien for charges follow as a matter of law?"

In Fuller vs. C., C., C. & St. L. R. R. Co., supra, Judge Wright says:

> "It is a familiar principle of common law that any one who has bestowed any particular service or care upon any article of property which has been confided to his possession for such purpose, has a lien upon it for any reasonable charge in respect to such service or care. It is difficult to see why the facts in the present case do not call for the application of this familiar principle. It is difficult to imagine why a railroad

company having bestowed a care upon property for which it is conceded to be entitled to a reasonable charge in that respect should be excepted from the general rule which entitles parties performing such service to a lien upon the property."

In N. & W. R. R. Co. vs. Adams, 18 S. W., 673, the court says:

"If the consignee is fully advised at the time of the shipment that the company has no agent at a particular station, or the place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable, in view of the condition of the company's business, there is an implied consent that the carrier's responsibility shall be dissolved when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business."

In Penn. R. R. Co. vs. Midvale Steel Co., 51 Atl. Rep., 313, the comment of the court is as follows:

"The further objection to plaintiff's claim is that it does not aver expressly or impliedly that these parties ever became parties to any contract for the payment of demurrage on detained cars. But they were parties to the contract of shipment over the plaintiff's road, and this is averred; and then, further, it is averred that since the demurrage rule was adopted it has formed part of the contract of shipment. This is sufficient averment of the implied contract. As a consignee of goods over plaintiff's railroad, it impliedly contracted to submit to all reasonable rules for the regulation of shipments. That the shipper was not consulted in framing the rules does not affect their validity. Kentucky Wagon Co. vs. Ohio & M. Ry. Co., supra. There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying or rules for demurrage. * * * It was not bound to serve a verbatim copy of the rule on defendant. That could have shown nothing so specifically as the charge, which plainly says what detention is allowed, what excess is charged, on what car, and on what goods.

> And that defendant had full knowledge is shown by its own admission that bills for violation of the rule were regularly rendered."

In the case now before this court, it will be recollected that appellant had been familiar with the car service rules of the appellee for more than a year prior.

In Miller vs. Mansfield, 112 Mass, 260, the court said:

> "For the purposes of this hearing all the facts which the defendant offered to show are to be taken as established. We must assume, therefore, that there was an existing regulation and usage of the Housatonic Railroad Company that carloads of freight like that of the plaintiff's should be unloaded by the consignee within twenty-four hours after notice to him of their arrival; that for delay in unloading, after twenty-four hours, the consignee should pay two dollars a day for each car belonging to other railroad companies, and that this regulation and usage was known to the plaintiff.
>
> "Being known to the plaintiff, it is presumed, in the absence of any evidence to the contrary, that the parties contracted in reference to it. It enters into and forms a part of their contract, and the railroad company is entitled to recover the amount fixed by the usage, by virtue of the plaintiff's promise to pay it."

In M., D. & T. Co. vs. Moore, 88 Ill., 136, it appeared that the consignors were frequent shippers over the railroad in question; that they had accepted certain bills of lading, but subsequently objected to being bound by the conditions therein. The court said:

> "We must presume, from the fact that the consignors were frequent shippers by this line, and in the habit of receiving like bills of lading, that they were familiar with its contents, and hence, when they accepted it, knew that it obligated the defendant only to ship to the Chicago depot."

In C., M. & St. P. vs. Pioneer Fuel Company, supra, the court said:

"When one person uses the property of another after being notified that a charge will be made for the same, the law implies a contract to pay a reasonable sum for such use. This is an elementary principle, and one of every day application in the courts. The fact that the property was not originally taken for that use, but was obtained by holding the property beyond a reasonable time after obtaining it for another purpose, cannot, either upon principle or precedent, make any difference. * * * It is the policy of the law to require a reasonable compensation for every valuable thing obtained or of which the complaining party has been deprived. It is the policy of the law to engraft by implication all those provisions upon every contract which are grounded in the good faith of each party, and are not, therefore, expressed in the contract."

In I. C. R. R. Co. vs. Alexander, 20 Ill., 23, it is said:

"The agent of the plaintiffs below had abundant notice that the company claimed the right to charge for storage after the goods had remained in the depot one day, and by suffering the goods to remain in the warehouse for any length of time, when by such rule they would be subject to charge, he impliedly agreed for his principal to pay reasonable charges for the storage, and until these charges were paid, the company were not bound to let the goods go.

"The law is now too well settled to bear discussion that a railroad company may assume the double character of carriers and warehousemen. That their duty as carriers is ended when they have placed the goods in a safe depot of their own or any other safe warehouse. That their depot is their warehouse, and that for warehouse services they have a right to charge a reasonable compensation, the same as other warehousemen. The railroad company in this case, after their relation to the goods as common carriers had ceased, is then to be considered and treated the same as other warehousemen would be considered and treated in case the goods had been placed in another warehouse. * * * While a lien for these charges existed, which the agent of the plaintiffs neglected or

> refused to pay, the company was not guilty of a conversion, by retaining the goods for such non-payment. If the charges claimed for the storage were unreasonable, the plaintiff should have tendered a reasonable amount for the charges, and then if the company had refused to receive it and deliver the goods, it would have been guilty of a conversion."

The above has been cited time and time again with approval by our Supreme Court.

In Darlington vs. Missouri Pacific Railway Company, 72 Southwestern, 122, the court, speaking of what are commonly called demurrage or car service rules, says:

> "It is conceded that plaintiffs had knowledge of the existence and terms of this rule, and that they only objected to the payment of the demurrage charges on account of the weather, and it appears from the evidence of Darlington that the rule had theretofore been recognized and acted upon by the plaintiffs; so that, leaving out of consideration the stipulations in the bills of lading, there is abundant evidence that plaintiffs impliedly agreed to be bound by these car service rules. But, independent of any express or implied contract of plaintiffs to be bound by the rules, the modern doctrine in this country is that the right to demurrage, in such circumstances, exists independent of contract or statute."

In the case of M., L. S. & W. vs. Lynch (Wis., 22, L. R. A., 532), a car of lumber had been allowed to stand on the side-track until one dollar car service had accrued. Lynch then offered to pay the freight and unload the car, but the agent refused to consent, unless the one dollar car service was paid. Nine days later, the car was unloaded by the railroad company, and Lynch, over the protest of the agent, took the lumber. The company brought suit against him for the charge. The court and jury found that the car had been properly placed for unloading; that the rule in question was a reasonable one as to the time allowed within which to unload and as to amount of charge per day. Judgment was rendered against Lynch for $22 and costs.

In Goff vs. Old Colony Railroad, 6th District Court of Rhode Island, 22 L. R. A., 532, the commodity was a carload of brick, upon which car service charges had accrued, and the company refused to deliver the car until same had been paid. The court affirmed the railroad company's right to hold the freight until the car service charges were paid, and gave judgment for the railroad company accordingly.

In Campbell vs. B. & O. (Circuit Court, Jefferson County, West Virginia, March, 1893), the consignees were notified of the arrival of two cars of bark. They neglected to call and pay freight charges and unload same until after the free time had expired. They were then notified by the agent of the additional charge of one dollar car service upon each car. This they refused to pay, and the company, in accordance with its rules, declined to deliver the bark. Same remained in the cars, until charges amounting to $69 had accrued upon each car. The railroad company then sold the bark for the freight and car service charges, and Campbell brought suit against it for the value of the bark. The case was tried before the court. The court entered judgment in favor of the defendant company for $14.85, the difference between the value of the bark sold and the total amount of the freight and car service charges.

It seems to appellee that careful examination will show not only that the right to a lien is necessary, but that it is reasonable and logical.

First, and above all, it is right and just that the railroads should have it. They are compelled to furnish to the public cars for the transportation of commodities (R. S., Ch. 114, Sec. 84), and should have the reciprocal right to compel the prompt unloading and return of cars to the railroads after the transportation is completed. It is not sufficient to say that they have a right to resort to an infinite number of suits at law to recover any reasonable charges for the detention of the cars against parties who are not known to them and who may not be responsible. But it is necessary that they should have some means within their own control to enforce the prompt unloading of their cars after a reasonable time had elapsed for the unloading of the same.

Second, as a matter of law, carriers have a lien for all charges connected with the transportation of freight from shippers to terminus; and,

Third, as a matter of law, carriers have a right to store freight, which is not called for within a reasonable time, and either the carrier or warehouseman with whom the same is stored have a lien for warehouse charges.

Fourth, it would seem that as a matter of law, from the last two propositions, that if a carrier can store freight and hold the same in its own warehouse until the charges of a warehouseman are paid, then, if the consignee receives his freight in carload lots, and in such shape that it is not practicable for the carrier to unload and store same, and it must be unloaded by the consignee from the car, and the consignee, instead of unloading same within a reasonable time, uses the car for his own convenience and profit as a storage place, it should follow that the carrier should have the same lien for all such reasonable charges for the use of the car as it would have had if the freight had been of such character that it could and should have been unloaded and placed in a warehouse. In short, in dealing with freight which is being shipped in carload lots and delivered in cars upon tracks, the character of the warehouse is simply changed. The railroads, not being able to unload it or store it as the law says that they may do, are obliged to leave it in their cars until the consignee chooses to unload it, and during all this period of detention the cars are the actual warehouse, and the same reasoning which gives a lien for warehouse charges when freight is unloaded and stored in a warehouse, must necessarily fix a lien for charges for the use of the cars, when it is found impossible to unload or store the freight.

THE CASES CITED BY APPELLANT.

The appellant relies almost entirely upon the case of Chicago & Northwestern Railway Company vs. Robert E. Jenkins, 103 Ill., 588, in support of his position. The facts and conditions appearing in that case, taken in connection with the time at which the same arose, are such that, in our opinion, the same is not applicable, and would not now be held by this court to be decisive of the question now before it.

We desire, briefly, in commenting upon the Jenkins case, to call the attention of the court to the following features, which are so different that we believe it is not decisive of this case.

In the Jenkins case, it appears that a quantity of paper had been consigned to Noyes & Messenger, at Chicago, from some person at Clinton, Iowa. This paper arrived at the depot of the Northwestern road on July 4, 1872. The freight was paid on the 11th, and after one drayload of paper was removed, the company refused to deliver the balance until the consignee should pay $5 per day for each day the paper had remained in the car after twenty-four hours from the time of its arrival. The court will notice the following distinctions:

1. The load in that case was paper, a commodity which might very properly have been unloaded by the railroad company, and stored in its warehouse. In fact, this seems to have been one of the controlling points before the court in that decision, the court saying: "Railroad companies have warehouses in which to store freights."

Neither does it appear from the opinion in the Jenkins case whether the paper in question constituted the entire load of the car, or whether it was merely a part of the merchandise contained in the car.

In the case at bar the load was coke, a commodity which could not be stored in warehouses with advantage to either the railroad company or the consignee. In this connection it ought also to be remembered that it appears from the evidence herein that the coke constituted the entire load of the car, and that it is the universal custom that shipments of carload lots are unloaded by the consignee.

2. In the Jenkins case, the railroad company sought to enforce car service after the expiration of the first twenty-four hours from the time the car arrived. Neither was there, in that case, any evidence that the consignee knew of the regulation of the railroad company requiring the unloading of cars within twenty-four hours after arrival; nor does it appear that the consignee had knowledge as to when the car arrived.

In the case at bar, the rules of the appellee company introduced in evidence provided that the cars in question should be unloaded within forty-eight hours from the first seven o'clock a. m., after the car was placed upon the track for unloading. Another of the rules provides that Sundays shall not be included. As a matter of fact, the construction put upon these rules is to allow forty-eight hours from the seven o'clock a. m., succeeding the day on which the cars are placed upon the track for unloading. It further appears from the evidence that in the case at bar appellant knew of the arrival of the cars, and that same were ready for unloading on Friday, June 20th, the day preceding the day from which the forty-eight hours' limit would commence to run. So that, instead of merely the forty-eight hours allowed by the rules, appellant had nearly seventy-two hours within which to unload before any charge for detention would have been made.

3. In the Jenkins case, it was sought to enforce a charge of $5 for each day the car was detained in unloading after the expiration of twenty-four hours. In the case at bar the charge made was but one dollar per day after the expiration of forty-eight hours provided by the rules, but, in fact, after the expiration of about seventy-two hours, Sunday not included. It appears from the evidence in this case that $5 per day is much more than the average daily earning capacity of a car, so that the court might well have considered the charge of $5 attempted to be collected in the Jenkins case, as in the nature of an unlawful penalty. On the other hand, it appears from the evidence in this case that the average daily earning capacity of a freight car of appellee was $2.15, and that the average daily earning capacity of the freight cars of twenty-nine railroads of the United States was $2.42. It will thus be seen that the charge of $1 per day in the case at bar was less than fifty per cent. of the amount which the appellee company would have received had the cars been promptly unloaded so they might have again entered its service.

4. In the Jenkins case, the court said:

> "Railroad companies discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee."

It is evident from this language used by the court in that case that the court did not have in mind a case where the load was a carload lot, and which is always unloaded by the consignee, but did have in mind package or parcel freight of the character that was ordinarily and customarily unloaded by the railroads themselves into warehouses or places provided by them for that purpose.

In the case at bar it is admitted that it was the obligation of the appellant to unload the cars in question. It would seem that a railroad car loaded with a commodity which it is not customary for the railroad company to unload into a depot or warehouse, but which is always unloaded by the consignee, is rather to be compared to the ship mentioned by the court in the Jenkins case, than to the railroad car considered in that case as loaded with ordinary package or parcel freight.

In the Jenkins case, the railroad company termed the service for which it sought to make the charge of $5 per day "demurrage." The use of this word seems to have been unfortunate, as the court evidently considered the word in the technical sense in which it is used in the maritime law, and said that the right to demurrage, if it existed as a legal right, was confined to maritime law, and only existed as to carriers by sea-going vessels, and further said, that such right was believed to exist alone by force of contract.

The charge of one dollar per day, made in the case at bar, is, as appears from the evidence, made primarily for the use of the car, and the track upon which the same stood, and incidentally for the responsibility, risk and expense to which the company may be put in holding the car with its contents upon the track, occurring during the unnecessary detention of same by reason of additional necessary switching of the same. Whether this service be termed demurrage, as it was in the Jenkins case, or whether it be called a car service charge, as is more common, it was, nevertheless, an additional service performed by the railroad company over and above the matter of transportation, and necessitated wholly by the default or failure of the appellant to receive cargo within a reasonable time.

In this connection we wish to call the court's attention to the fact that it is believed that the court was in error when in the Jenkins case, it said, that the right to demurrage was believed to exist alone by force of contract. While the rule in English courts has generally been that demurrage in maritime law exists only by express contract, yet the courts of this country have repeatedly declined to follow the rule of the English common law courts on this subject, and have held, that a ship-owner has a lien upon the cargo for demurrage, notwithstanding the absence of any stipulation of contract therefor in the bill of lading.

In Hawgood et. al. vs. 1,310 Tons of Coal, 21 Fed., 681, the court, after citing at length many cases, concludes as follows:

> "It is thus apparent that there is no ground for contention, at least, in a court of admiralty, that the right to maintain a claim for demurrage or damages for unreasonable detention of a vessel, is dependent upon the existence of a demurrage clause in the bill of lading. That an admiralty action in personam, will lie in such a case against the consignee of the cargo, if he is responsible for such detention, is also beyond question, whether the bill of lading contains any stipulation on the subject or not. Why has not the ship owner also a lien on the cargo for demurrage, and why could not such a lien be enforced in admiralty? * * * Why should the right of the ship owner be limited in the admiralty to the common law lien, when, in fact, that right is dependent on the law merchant, which extends the lien or privilege to all damages and expenses growing out of the affreightment. It is the doctrine of the law merchant that the master or ship owner contracts rather with the merchandise than with the shipper; and, as is remarked by Judge Shepley, in Donaldson vs. McDonald, 1 Holmes, 290: 'It necessarily follows from this, that the merchandise is liable whenever the shipper is liable.' In the present extended jurisdiction of admiralty, a liberal recognition of the rights of the parties interested in lake navigation or commerce, no sound reason is apparent why the ship owner's privilege and lien should not be extended to demurrage. If the ship is bound to safely deliver the cargo to the consignee without exemption

from liability, except such as may be named in the bill of lading, the cargo ought to be answerable for the neglect of the consignee to duly receive it. The cargo may be libeled for freight. Why not for the extended freight which the vessel is improperly caused to lose, where, as in this case, the consignee is the owner of the cargo? * * * The course of argument has led me to consider the question and the authorities at some length; and I am constrained to say, that if the question were an original one, I should have little hesitation in coming to the conclusion announced. The libelants received from the consignee the freight money due them, but it was received under protest and subject to the demurrage claim, and upon the facts shown, I am of the opinion that the demurrage was not waived or lost by reason of anything that transpired in relation to the delivery of the cargo, or of the receipt of the freight moneys."

In the case of the M. S. Bacon vs. Erie & Western Transportation Company, 3 Fed. Rep., 344, it was held, that an express stipulation for demurrage in a contract of affreightment was not necessary to entitle the owner of the vessel to compensation for unnecessary or improper detention in loading or unloading.

In Transportation Co. vs. P. & R. Coal & Iron Co., 70 Fed., 268, and in the same case in the Circuit Court of Appeals, 77 Fed., 919, it was held, that one who charters a vessel under a contract that is silent as to the time of unloading and discharge, contracts, by implication, that he will unload and discharge her within a reasonable time, and with reasonable diligence.

It may not be irrelevant to call attention to the allusions of some of the courts of other states to the Jenkins case.

In Miller vs. Georgia Railroad Company, 88 Ga., 563, the court, after quoting from the Jenkins case, says:

"In our opinion the reasoning in that case is inconclusive. We see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles, as well as carriers by sea. What we have already said, we think is a sufficient answer to the reason assigned, that railroad companies have ware-

houses in which to store their freights; and the reason that 'railroads discharge the cargoes carried by them,' and 'carriers by ship do not; but it is done by the consignee,' of course, cannot operate as to cases provided for by this rule, which, by its terms, applies only where the unloading is to be done by the owner of the property. Nor is it settled that the right to demurrage in maritime law exists only by express contract. In this country the courts have repeatedly declined to follow the rulings of the English common law courts on this subject, and have held, that the ship owner has a lien on the cargo for demurrage, notwithstanding the absence of any stipulation therefor in the bill of lading. But we are not controlled by the authorities which govern as to demurrage under maritime law. The adopting by the railway company of the term 'demurrage,' as a designation for this charge does not require us to resort to that law as a standard for testing the validity of the rule. We are to look to the real substance and effect of the rule, rather than to analogies suggested by the technical designation which the carrier in this instance (Jenkins case), has seen fit to adopt. To hold that because the conditions of carriage by sea are different, no charge under this name can be enforced by the carrier by land, or, if allowed, that it must be governed by the rules of marine law, would be to adopt a narrow and merely technical view, ignoring well-recognized grounds of public policy, and the right of the carrier to prescribe reasonable rules and regulations for its own safety and the benefit of the public."

In C., M. & St. P. Ry. Co. vs. Pioneer Fuel Company, the District Court of Woodbury County, Iowa, in rendering its opinion, commented upon the Jenkins case as follows:

"It is claimed that the language upon page 599 (103 Ill.) of the opinion holds adverse to the plaintiff herein. But bearing in mind the facts of that case, it seems clear to this court that the learned judge had in mind the lien which was involved, and not the charges which the lien was invoked to secure. * * * The action being in trover, the legality of the charge for the wrongful detention of the case, was not and

could not, under the view of the court, be involved. And we ought not, by a forced construction of the court's language, make it decide a case which was not before it, and which, in all probability it had not considered and had not in mind. If we bear in mind this, and the further fact that the charges in that case were five dollars a day, which the court may have found to be exorbitant, we can get to a better understanding of the language of the court, and will find therein nothing wholly irreconcilable with the right of the plaintiff in that case to have maintained an action in ordinary proceedings for the reasonable value of the use of the cars negligently detained beyond a reasonable time, for unloading the same."

In U. P. D. & G. R. R. Co. vs. Cook, 50 A. & E. R. R. Case, 89, the District Court of Arapahoe County, Colorado, the court, in speaking of the Jenkins' case, said:

"The decision mentioned in Illinois said that the question of demurrage only applied to the maritime law. I do not think that it is any reason why we should hold there is no law, because there is no statutory law that has been promulgated."

In the case of Purcell vs. N. Y. C. & St. L. R. R. Co., in the Circuit Court of Cook County, Judge Horton said:

"Were it not for the case of the Northwestern Company vs. Jenkins, 103 Ill., 588, this court would have no serious trouble in this case. That case at first seems to be conclusive of the question now before the court. That case was decided upon an agreed statement of facts, and at my request I have been furnished with and have examined a copy of this agreement as filed in the Supreme Court, which passed upon the case. When the facts in that case are examined and compared with the details of the case at bar, it will be seen they differ materially. For instance, in a sentence from their opinion on page 600, the Supreme Court says: 'But the mode of doing business by the two kinds of carriers is essentially different.' That is, carriers by sea and carriers by rail. 'Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads discharge

cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not. And it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers.' It appears in the evidence, and perhaps the court should take judicial cognizance of the fact, that the railway company has no warehouse for the storage of coal shipped in bulk. Another difference in the facts is that the railroad company is required by law to deliver this coal into the complainant's yard. Again, it is the duty of the consignee to unload this coal, the same as it is the duty of the consignee to unload a vessel. There is no demurrage, as such, in the technical sense of demurrage, claimed in this case. There was no bill of lading accompanying the coal, but it was the custom, as between this railway company and this consignee and the consignor, to ship the coal without bills of lading. I do not know what the railway's custom is, but they have some sort of checks or bills for the use of their conductors and they are delivered with the goods. As remarked by the Supreme Court in the Jenkins case there can be no such lien except by contract, or where it is allowed by law. There are many classes of cases where a lien is allowed, and where, without any specific contract to that effect, the law sustains it, such as innkeepers, agisters, carriers, bailees and warehousemen. Demurrage, as such, technically, cannot be sustained; but the right of lien is not limited here, technically, to the word demurrage, or to what may be defined demurrage. When the railway company placed the cars in the yard, the relation of carrier ceased. When the cars were shunted onto the side-track in the yards of the plaintiff, then the relation of carrier ceased; but was not the railway company furnishing storage for this party? Substantially the same relation exists when cars were set upon a side-track, ready to be delivered, and plaintiff did not receive them. It seems to me that the company, under such circumstances, would be sustained in so leaving the coal in cars, and considering the class of freight, it is a proper place to store it. It would not be a proper place to store paper, such as was the subject-matter of

the Jenkins case, but it would be for bulk coal Whether it be called demurrage or car service, or whatever it may be, it seems that the company is entitled to a lien for a proper charge. If they make an unreasonable charge, the plaintiff can make tender, replevin or pay under protest. If the company is to look to the parties in a civil suit for the money, they have to sue as many parties as were owners of the coal while it remained on the cars. I do not think that is a reasonable rule to establish."

In Fuller et. al. vs. C., C., C. & St. Louis R. R. Co., Circuit Court of Coles County, Illinois, April term, 1896, Judge Wright, who rendered the opinion of the court, said:

"Were it not for the decision of the Supreme Court of this state in the Jenkins case, reported in 103 Ill. reports, the court would have little difficulty in reaching a conclusion.

However, the court has arrived at a conclusion which at least is satisfactory to itself. The common law rule in respect to liens is a familiar one, and of wide and varied application.

It is a familiar principle of the common law that one who has bestowed any particular service or care upon any article of property which has been confided to his possession for such purpose, has a lien upon it for any reasonable charge in respect to such service or care. It is difficult to see why the facts in the present case do not call for the application of this familiar principle. It is difficult to imagine why a railroad company, having bestowed a care upon property for which it is conceded to be entitled to a reasonable charge in that respect, should be exempted from the general rule which entitles parties performing such service to a lien upon the property.

All, in my judgment, that the Jenkins case determines is that the consignee is not bound by the rules of the company unless he consents or agrees thereto. This principle is generally true, not only in cases like the present, but in all other cases. It is not denied that the shipper is entitled to a reasonable time to unload the cars before he is subjected to any charges.

The statute in respect to grain provides that twenty-four hours is a reasonable time. In the case at bar, the rule gives forty-eight hours. It is difficult to see why twenty-four hours in the one case should be a reasonable time, and forty-eight hours in the other case should be unreasonable. Therefore, it can hardly be contended that forty-eight hours is an unreasonable time under the facts and circumstances of the case, in view of the express legislative provision in respect to freight which consists of grain.

The legislature has seen fit to pass another statute in this state, which, while it is not upon the express subject involved in this case, seems to me to have a very pertinent application, and to a certain extent will control the decision of this case. It is the statute relating to unclaimed property, Chapter 141, Revised Statutes. The title of that act is 'An act to provide for the sale of personal property by carriers, warehousemen, innkeepers, and by others having liens thereon.' Now, it seems to me this statute plainly recognizes that railroad companies have a lien upon all personal property transported by them, not only for freight, though that is not the word used by this statute, but for the reasonable charges thereon. It is conceded in this case that the railroad company has the right to charge for car service after a reasonable delay on the part of the consignee in unloading the freight. If that be true, then it becomes a legal charge to the same extent that the freight rate is a legal charge, and this statute, by its title, and by its plain provisions, recognizes that lien and subjects the property, under certain conditions, and after the lapse of a certain time to be sold to pay these legal charges. This view of the case seems to be more consistent with justice between man and man than the other view of the case contended for, which is that the railroad company should sue the party for those charges.

To recognize a lien existing in favor of the common carrier is promotive of justice. It avoids litigation and enables the parties to settle these small charges without controversy. The principal object of the rule of the company doubtless is not to secure the small charges made for the use of cars, but to secure to themselves and to the public, the use of the cars.

If the courts refuse to recognize liens under these circumstances shown in the evidence here, it would not only be a detriment to the railroad company, but it would be destructive to the public's interest in view of the fact that it is necessary, both for the railroad company and the public, that the railroad company should at all times have the use of their cars in order that the public business may be properly transacted."

Many more cases might be cited from the decisions of other states wherein the position set forth in the Jenkins case is not sustained. But for the purpose of this hearing it is in our opinion wholly unnecessary to question the wisdom of this court in that case. The court places its decision in that case upon the broad ground that a railroad company, having a right to unload cars and store the freight, could not charge for the use of cars which it might, by the exercise of diligence, have unloaded. But it is not believed that this court will ever hold that a railroad company should unload freight in bulk, such as coke, coal, grain, wood or the like, and store the same either upon the ground or in warehouses. It is so obviously impracticable, not to say impossible, that the necessity for permitting the freight to remain in the cars until the consignee sees fit to unload it, or until it can be disposed of in car load lots, is at once apparent. A radical distinction exists between the delivery to consignee of freight in bulk in car load lots, and the miscellaneous parcel and package freight which can easily and with little expense be transferred to a warehouse. This distinction is recognized in the case of Coe vs. L. & N. R. R., 3 Fed., 775, wherein the court says:

"The common law must be applied, as the necessity of its relaxation did not exist. This rule (rule regarding the delivery of grain to a warehouse on the line of the road) is just and convenient, and necessary to an expeditious and economical delivery of freight. It has regard to their proper classification, and to the circumstances of the particular case. Under it articles susceptible of easy transfer may be delivered at a general delivery depot provided for the purpose. But live stock, coal, ore, grain in bulk, marble, etc., do not belong to this class. For these some other and more appropriate mode of delivery must be provided."

As above stated, the Jenkins case was tried upon an agreed state of facts. The sixth clause of the agreed statement was as follows:

> "At the time this paper was received by the defendant into its cars at Clinton, and when cars were received or arrived at the railway station in Chicago, the defendant had standing on its grounds, and along its tracks, freight houses into which it did, and was accustomed to put freight brought in by it or on its cars to Chicago, as well as to allow it to remain in the cars unloaded."

An inspection of this clause is sufficient to show that the Railway Company in that case practically admitted away the foundation of its claim for demurrage in saying that it had freight houses, into which it did, and was accustomed to put freight brought to Chicago. Such being the case, it was not in a position to charge a high price for the use of cars on its track, which might be very valuable, when it at the same time had the facilities for unloading the freight into a warehouse, and when it was equally customary to so unload into such warehouses. In the case now at bar, the company had no warehouses within which to store coke, nor was there any claim that it was the custom to store coke in warehouses, or that the appellant expected it to be stored in a warehouse, and if stored the coke would have been depreciated in value by the additional handling.

We are confident that had the question of car service been properly presented to this court in the light of the facts in the present case, it would have arrived at a very different conclusion as to the right of a railway company or a ship owner to collect damages in the nature of demurrage for an unreasonable detention, regardless of contract.

The appellant, in addition to the Jenkins case, has cited the two cases reported in the 73d Illinois Appellate, namely, C., C., C. & St. L. vs. Holden, 73 Ill. App., 582, and C., C., C. & St. L. vs. Lamm, 73 Ill. App., 592. The opinions in each of these cases were by Justice Harker.

In the Lamm case it appears from the opinion of the court that the condition of the railroad yard for some thirty or forty feet between the car and the macadamized

road over which the teamster had to drive, was very bad because of the mud. The court found as a matter of fact that there was no unnecessary delay on the part of the defendant in removing the lumber in question, and says:

> "The delay seems to have been caused by the muddy condition of the railroad yard in which the car was standing, in which not more than half a wagon load could be hauled at one time."

Furthermore, the court said:

> "Neither the amount of the judgment ($35), nor the questions of law involved in the controversy, will justify a discussion in detail of the numerous points of contention raised by the appellant. We feel that the law of the case was settled in the case of C. & N. W. Ry. Co. vs. Jenkins, 103 Ill., 588."

The fact that the court found that there was no unnecessary delay in unloading the car, due to the fault of the railroad company in failing to have its railroad yard in a suitable condition for the hauling of full loads, probably influenced the court in its decision of this case more than the law or argument of counsel. Had there been no dispute in the facts, we are inclined to the opinion that the decision of the court would have been different, and instead of announcing the proposition that a railroad company has no lien or right of retaining for car service charges the goods consigned, it would have held that while in their warehouse, or, in the case of car load lots, in their cars, it would have a lien upon the property for the payment of a fair and reasonable and just charge for the storage made necessary by failure of consignee to unload within reasonable time.

The same questions of fact were evidently leading features in the decision of the Holden case, wherein Judge Harker says that he is guided in his decision by the holding of the Supreme Court in the Jenkins case, to the effect that the right of demurrage does not attach to carriers by rail, and that liens are only created by law or by contract of the parties.

We believe that we have shown to the satisfaction of this court that the statement of this court in the Jenkins case to the effect that the right of demurrage only existed

by virtue of express contract, was wrong, and that in this country the right to demurrage is recognized, although the contract of carriage may be entirely silent in that respect.

The only other cases relied upon by appellant, are those of E. T. V. & G. R. R. Co. v. Hunt, 83 Tenn., and Crommelin v. N. Y. & H. R. R. Co., 10 Bosworth, 77.

In the Hunt case it appeared that a car load of stoves had been consigned to the defendant, and that after the car arrived at destination "it was three or four days before the car was placed at the point for unloading," and when this was done and the consignee sent hands to unload, the agent refused to unlock the car, because the freight had not been paid. The consignee offered to pay the freight once or twice, but the company would not place the car in position to be discharged of the goods, because the company claimed damage of $2 or $2.50 per day on the cars, of which payment was refused.

The court further says:

> "Under any state of facts in the absence of an agreement to the contrary, the company was not entitled to demand or recover either freight charges or demurrage until it was in a position to tender delivery of the goods at a safe, convenient and uninterrupted point at its depot or on its road. The legal effect of this undertaking was to deliver the goods at a point and in a manner to enable the consignee to receive them without inconvenience, delay or interruption. If it requires the consignee to remove the goods in a limited time, it must do all in its power to enable him to do so, while it may, after giving notice of the receipt of the goods, require prompt action on the part of the consignee, he may demand of it free, convenient, safe and undisturbed access to his goods."

From the above it is evident that there was no merit in the charge of $2 or $2.50 per day sought to be made in that case. The court does, however, recognize the right of the company after giving notice of the arrival of the goods to the consignee to require prompt action on the part of the consignee in unloading the same, but insists that

such prompt action cannot be demanded by the company unless it has placed the car where it can be safely and conveniently unloaded without interruption.

The court having found as a matter of fact that the railroad company was not entitled to the charge, did not apparently make any considerable investigation as to the right of the company to secure the charge in question by a lien, but relied upon the decision of Somes v. The British Empire Shipping Company, which case, in accordance with the older English authorities, held that demurrage was strictly a matter of contract.

In the Crommelin case it appeared that three cars loaded with marble were transported by the railroad company to the point of destination, and that the same remained in the street in front of the depot for several days. A charge of one dollar per car per day was sought to be imposed by the railroad company, and the company refused to deliver the marble without the payment of this. The court, in rendering its opinion, laid considerable stress upon the fact that the cars were allowed to remain on a public street, and as a matter of fact created a public nuisance. Furthermore, considering the character of the load of the cars, the court said:

> "So far as any safety of the merchandise was concerned, its bulk would probably have rendered it equally safe if taken off from the cars and laid on the pavement. Leaving articles in an open vehicle exposed on a highway is not the kind of storage for which a lien can be acquired."

In a dissenting opinion by Judge Monell, rendered in this same case, it was held that inasmuch as the consignee had notice of the regulation when he shipped the marble, that there was an implied agreement upon which the railroad company could recover in an action for that purpose. The dissenting opinion does, however, say that the right of lien, if any existed in favor of the railroad company, must be established either by express contract or by the common law, and cites the cases of Burley v. Gladstone, 3 M. S. R., 205, and Lambert v. Robinson, 1 Esp. R., 119. (See comment on first of these cases in the Hawgood case, 21st Fed., 681.)

As above stated, the holding of the admiralty courts in this country, as set forth in the cases of Hawgood v. 1,310 tons coal, 21 Fed., 681, and Young v. 140,000 brick, 78 Fed., 149, is not in harmony with the holdings of the English courts, in that they say that in maritime law the right of demurrage exists aside from agreement by express contract.

In the Crommelin case it was held that the defendants could not be regarded as warehousekeepers and as such entitled to lien for storage, the court saying:

> "They did not in any sense store the plaintiff's marble. It was left upon the cars standing upon the railway track in the public highway. Upon its arrival at the place of destination and notice to the plaintiff, and a reasonable time given to accept and take by the consignee, the defendant had discharged their whole duty and could not be responsible for any loss or damage; and hence no right of lien could arise for housing, unless defendants were warehousemen as well as carriers, which they were not in this case."

The Crommelin case was decided in November, 1862. At that date railroading was comparatively in its infancy, and the shipping of commodities in bulk and car load lots to be loaded and unloaded by the consignor and consignee was comparatively unknown. Nor do we think that the law was correctly stated in that case, when it was said that after a reasonable time had elapsed within which the consignee might accept the goods, that the defendants had discharged their whole duty and could not be held responsible for any loss or damage. We do not understand that a common carrier can abandon, as a matter of indifference, property transported by it, after it has afforded a reasonable opportunity to the consignee to call for or unload the same, but that after such time has elapsed the carrier must assume the obligation of a warehouseman.

In Gregg v. Illinois Central R. R. Co., 147 Ill., our Supreme Court, speaking upon this point, said:

> "The railroad company was not required to keep corn in its cars on track indefinitely, and although the consignee was in default in not receiving the freight

after a reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as a warehouseman. In the exercise of such care it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might with the exercise of a like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the consignee and thereby discharge itself from further liability."

CONCLUSION.

In conclusion, we respectfully submit that the propositions contended for by appellee in the opening of this brief, are sustained by the authorities, namely:

First. That after a reasonable time had been afforded appellant to unload the cars of coke in question, that this appellee had a right to make a reasonable charge, known as a car service charge, for the further detention and use of the cars and track.

Second. That the appellee was entitled to a lien upon the contents of said cars to secure such charge.

It will be seen by an examination of the authorities cited, that the courts of many states, notably those of Massachusetts, Virginia, Kentucky, Wisconsin, Iowa, Rhode Island, Colorado, Georgia, Missouri and Pennsylvania, have passed upon this question, and that every one of them have upheld the right of a railroad company, in proper cases, to make a car service charge, and to collect same by retaining a lien upon the contents, or such portion of the same as may remain in the cars. In some cases, the charge in question is called "a car service charge"; in others, a "demurrage charge," and in still others, a "charge in the nature of demurrage"; but it is obvious that a storage or warehouse charge is what is meant in each case.

The law requires railroad companies to transport the commodities offered them for transportation. Such commodities must, therefore, be transported by them. When

delivered at their destination what shall be done with them? It would be a physical impossibility for railroads to provide warehouses in which these commodities could be stored if not unloaded within a reasonable time after they have arrived at their destination. And if the shipper could, by any possibility, indicate to the railroad company the character or kind of a house in which he desired his goods should be stored, the impossibility of providing storage room would be still greater. One might want a steel structure, another one an iron building, another a brick building, and it would be necessary for the railroad company to have all kinds and character of buildings in order to suit the varying tastes and dispositions of the different consignors and consignees. If railroads can store goods which are shipped over their road in a warehouse or depot and relieve themselves of their liability as common carriers, what reason is there why they cannot relieve themselves of their liability by continuing to use the car in which they were shipped, for a warehouse. Counsel for appellant, in his brief, concedes, for the sake of argument, that the company has the right to charge for the use of the car. If this is so there must be some reason for it. How is it that it can charge for the use of the car? Certainly not for carrying the goods, for the transportation is over, and its duty as a common carrier has been performed when it has delivered the car at point of destination, and waited a reasonable time for the consignee to unload it. It then, as a common carrier, has only a lien for carriage charges. What, therefore, is it that enables it to charge for the use of the car. In our judgment, there is only one ground upon which it can do this, and that is that it is acting as a warehouseman, and as such, is entitled to compensation; and, if it is a warehouseman, it never loses possession of the goods, for although the consignee is permitted to unload a part of same from the car in which they have been transported, yet, as to the goods which are not removed, they are still in the possession of the railroad company as a warehouseman, and as such, it has a lien upon them for payment of any amount which may be due for storage charges. If railroad companies in proper cases are not allowed to enforce their lien as warehousemen, the railroad sidings all over this country will be crowded with cars that are partially unloaded, and the railroads will be unable

to provide vehicles enough to transport even a small percentage of the vast amount of freight which they are today carrying.

We have felt justified in the argument of this case in asking the court to examine carefully and at length the several points presented by the appellee; not that the amount of the judgment involved in this particular controversy will justify same, but because a decision of the questions involved herein will be far-reaching in its effect upon the commerce of the country.

It is respectfully submitted that the judgment of the Appellate Court herein should be affirmed.

PAM, CALHOUN & GLENNON, and
A. W. PULVER and S. A. LYNDE,
Attorneys for Appellee.

CHARLES D. CLARK,
Of Counsel.

REPLY BRIEF OF APPELLANT.

May It Please the Court:

The lien claimed by appellee railroad company did not exist at common law. The lien does not exist in this state by statute. The lien does not exist in this suit by agreement, expressed or implied, of the parties.

The fact that a railroad company publishes certain rules and regulations and these rules and regulations are known to the consignee, can raise no expressed or implied contract between them with reference to said rules and regulations.

Jones on Liens, 2d Ed., Vol. 1, Sec. 282, contains the following:

"A lien for demurrage in favor of carriers by land is not implied by law, and cannot be asserted, except by virtue of an express agreement, or of a custom so recognized as to have the force of a contract. The rules and regulations of a railroad company providing for a lien for demurrage,

though published, are not binding upon the consignor or consignee of goods without their consent, or the consent of one of them, when the contract for shipping the goods was made. Even the knowledge of such rules by the shipper or consignee, without assent thereto, does not bind him. The law does not presume assent to the rules of a railroad company, for damages caused by delay of the consignee in receiving goods shipped, from the publishing of such rules."

The case of Cleveland, C. C. & St. L. Ry. Co. v. Lamm, 73 Ill. App., 592, contains the following:

"It is insisted, however, that as appellant had adopted rules for demurrage charges, which were known to appellee, and because they had paid a like charge in 1890 and had not protested against them since that time, there was such acquiescence as would amount to a contract for a lien.

"Railroad companies cannot create in their favor a demurrage lien on freight not removed from a car within a short time, by simply publishing to the public their intention of doing so. They may attempt it, and shippers and consignees may be compelled to use their roads for the transportation of freight with full knowledge of the publication. Detention charges may be paid a few times by a consignee who may feel that he has been somewhat tardy in removing freight in those particular instances. But for all that, it could not be rightfully held that there was such acquiescence in a rule for demurrage charge as would amount to a contract for it in a future case where the consignee felt that there was an unreasonable insistence of its application."

In the case at bar it appears from the testimony that when the appellant's attention was called to the rule in question he told the agent of the company that it would be impossible to get the two cars unloaded within forty-eight hours or anywhere near that time, and that he could not and would not comply with any such rule. (Abst., 5; Rec., 25.)

It will appear from an examination of the authorities cited by appellee that none of them are applicable to the state of facts as shown by this record. Most of the authori-

ties have no bearing on the question of lien. Where the lien is discussed it is either obiter dictum, or decided in favor of the railroad company on the ground that the lien was established by expressed or implied contract between the parties.

A large number of the cases cited by appellee are circuit, county and district court cases, and are not reported. The facts upon which these decisions were based are unknown and therefore worthy of no consideration by this court.

The following are the only cases cited by appellee that have any bearing whatsoever on the question involved in this suit:

The case of Miller v. Mansfield, 112 Mass., 260, was an action of tort, for the conversion of 100 barrels of flour. The plaintiff was the owner of a bakery and had shipped to him by the defendant's line of railroad 100 barrels of flour, and the defendant railway company refused to deliver the flour until certain charges were paid for delay in unloading the car. The court expressly held that the parties contracted with reference to the rule of the railroad company to charge $2 a day for each car for delay in unloading. The court says, with reference to this rule (page 263):

"Being known to the plaintiff, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted in reference to it. It enters into and forms part of their contract, and the railroad company is entitled to recover the amount fixed by the usage, by virtue of the plaintiff's promise to pay it."

The case of Miller v. Georgia Ry. Co., 88 Ga., 563, merely decided the question as to whether or not a railroad had a right to make rules and regulations in regard to the time in which the cars may be unloaded, and to fix a reasonable rate per day for storage thereafter. The question as to whether or not the railroad company had a lien on the contents of the car for this storage was not involved, and any language of the court with reference to the question of lien was obiter dictum. The suit was brought by the Georgia Railroad Company against Miller & Co. for storage charges after the goods had been delivered. Moreover the suit is decided upon the theory that the parties con-

tracted with reference to the right of the railroad company to charge this storage. The court says, on page 576:

"Where regulation of this character is known to the customer before the contract of transportation is made, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted with reference to it (Miller v. Mansfield, supra), and it is operative whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor with the customary directions to notify the customer, or direct to the customer himself."

The case of the Kentucky Wagon Mfg. Co. v. the Louisville & Nashville Railroad Co. is an unreported case decided by the law and equity court of Louisville, Kentucky, December 20, 1891, a synopsis of the same being set forth in a note in the 50th Am. & Eng. Rd. Cases, page 90. In this case also there was no question involved with reference to liens, as it was a bill in equity filed by a manufacturing company against certain railroads to restrain them from refusing to deliver to the plaintiff upon its private side tracks certain loaded cars on account of any non-compliance on the part of the manufacturing company with the rules of the Louisville Car Service Association with reference to demurrage charges. The case simply holds, so far as can be gathered from these notes, that common carriers have a right to make reasonable rules and regulations.

The case of Philadelphia Railroad Co. v. Midvale Steel Co. (Penn.), 51 Atl. Reporter, 313, was an action brought by the railroad company against the manufacturing company for demurrage charges after the goods had been delivered, and the case went up to the Supreme Court on the question of the sufficiency of the affidavit of defense. There was no question of lien involved and none passed on by the court.

The case of Norfolk & Western Railroad Co. v. Adams (Va.), 18 S. E. R., 673, was an action of assumpsit brought against the railroad to recover back certain sums of money said to be illegally exacted from, and paid by the plaintiff to the railroad company on account of demurrage charges. In this case the court says:

"The plaintiffs in this suit had notice of the existence and operation of these rules, and they had paid the charges for the detention of the cars long before the commencement of the account sued upon; and they knew and agreed when the shipments were made, that such a charge would be made, unless they unloaded their cars in compliance with the rule of the company which gave to them seventy-two hours in which to unload their freight after notice of the arrival of the cars which they had stipulated to unload."

The court then goes on and decides that the rule in question was a reasonable one. There was nothing in the case involving the right of the railroad company to claim a lien for the amount of these charges.

The case of Darlington v. Mo. Pac. Ry. Co. (Mo. Court of Appeals), 72 S. W. Repr., 126, was an action of conversion brought by the plaintiff against the railroad company for taking certain lumber belonging to the plaintiff upon which the railroad claimed certain demurrage charges. The court says, with reference to this rule of the railroad company:

"It is conceded that plaintiffs had knowledge of the existence and terms of this rule, and that they only objected to the payment of the demurrage charges on account of the weather; and it appears from the evidence of Darlington that the rule had theretofore been recognized and acted upon by the plaintiffs; so that, leaving out of consideration the stipulations in the bills of lading, there is abundant evidence that plaintiffs impliedly agreed to be bound by these car service rules. * * * In this state demurrage charges as to shipments of grain in carload lots are allowed by statute. Section 1115, Revised Statutes, 1899."

The case of Norway Plains Co. v. Boston & Maine Ry. Co., 67 Mass., 263, was an action of contract upon the agreement of the defendants to transport certain goods from Rochester to Boston, it appearing that after the goods had been removed from the car to a warehouse that they were destroyed by fire. It will be seen from this state of facts that there was no question of lien involved and anything in the opinion with reference thereto is obiter dictum.

In the case of Swan v. Railroad, 106 Tenn., 229, the bill of lading expressly provided for demurrage charges and that

said charges should be a lien upon the freight which might be held by the railroad company until said lien was paid.

From an examination of the Illinois cases cited in our brief and a careful consideration of the cases cited by appellee there can be no doubt that the law is correctly set forth in Jones on Liens, 2d Ed., Vol. 1, Sec. 281, as follows:

"A carrier has no lien for charges not connected with the transportation of the goods, and not within the contemplation of the parties. Thus, ordinarily, a carrier has no lien for the storage of goods which he has carried unless there be a special contract allowing him to charge for storage. Nor has he a lien upon goods for demurrage arising from the consignee's neglect to take them away within a reasonable time after notice to him of their arrival. Thus, a railroad company cannot retain goods to satisfy a charge for the detention of cars by the failure of the consignee to remove the goods after notice; for the claim is in the nature of demurrage, and no lien exists for this. Such detention is a breach of contract simply, for which, as in the case of a contract in reference to pilotage or port charges, the party must seek his redress in the ordinary manner. He cannot enforce it by detention of goods."

Appellee's brief is largely devoted to a discussion of the benefits that would accrue to the railroad and consequently to the public if it were enabled to make this demurrage charge and enforce a lien therefor, and the great inconvenience and burden to the railroad and therefore to the public if this lien does not exist.

This brief should be addressed to the legislature and not to the courts. The province of the judiciary is to construe the laws and not to make them. The relief asked by appellee can only be given by the legislature, not by the courts.

Respectfully submitted.

LOUIS ZIMMERMAN,

Attorney for Appellant.

The opinion of the Supreme Court, filed February 17th, 1904, is as follows:

Present:

JOHN P. HAND, Chief Justice.
BENJAMIN D. MAGRUDER, Justice.
JAMES H. CARTWRIGHT, Justice.
JAMES B. RICKS, Justice.
JACOB W. WILKIN, Justice.
CARROLL C. BOGGS, Justice.
GUY C. SCOTT, Justice.

Docket Nos. 3206.—Agenda 34.—Oct. 1903.

Schumacher v. Chicago & Northwestern Railway Co.

Mr. JUSTICE RICKS delivered the opinion of the court:

Appellant brought an action of replevin in a justice's court in Lake county against appellee for three tons of coke. Judgment was for appellee in the justice court. On appeal to the circuit court of said county a trial was had before a jury, and the court directed a verdict for appellee and entered judgment thereon. Appeal was taken to the Appellate Court, where the judgment of the lower court was affirmed, and this appeal was prosecuted.

Appellant is a resident of Highland Park, and in June, 1902, purchased and caused to be shipped to himself at said place, over appellee's road two cars of coke. The cars arrived in Highland Park on June 20, at seven o'clock in the morning, and at nine o'clock in the morning of the same day appellee's station agent at said point mailed appellant notice of the arrival of the cars. Appellant is a practicing lawyer residing at Highland Park and having his office in the City of Chicago, and on the same morning of the arrival of the cars, and shortly after the mailing of the first notice, appellee's agent saw appellant personally and informed him that said cars had arrived. At that time appellee's agent did not know the freight charges, and neither by the first postal card nor by verbal statement was appellant informed on that day of the freight charges. On the morning of the 21st appellee's agent again notified ap-

pellant of the arrival of said cars, sending notice by postal card through the mail, which was received by appellant between 8.30 and 9 o'clock in the morning of that day. On the postal card so sent to appellant, after describing the freight, was the following: "Which is now at your risk; please pay charges and remove property within twenty-four hours, or same will be charged storage or delivered to warehouseman; all carload freight shall be subject to a minimum charge for trackage and rental of one dollar per car for each twenty-four hours' detention, or fractional part thereof, after the expiration of forty-eight hours from its arrival at destination." And across the face of said postal card was stampel the following: "If this car is not unloaded within forty-eight hours from 7 A. M., June 21, 1902, a charge of one dollar per day, or fraction thereof, will be made for car service, for which this company reserves a lien upon the contents of car." Upon the 21st of June, and after the receipt of the postal card by appellant on that day, he went to appellee's station and there paid its agent the freight, taking a receipt therefor, and on each of the freight bills was stamped a notice identical with the one last above quoted. When appellant received the freight receipts he called the attention of appellee's agent to the notice with reference to the charge for car service contained thereon, and stated to him that he could not get the cars unloaded within forty-eight hours, or anywhere near that time; also recalled the fact that he had had trouble a year or so previous to this shipment with this same company at the same station, growing out of appellee's insistence upon the enforcement of the above rule. Appellant then engaged one James H. Duffy, whose business was the hauling of coal and coke, to haul the same for him, but was informed by said Duffy that he could not begin the work until the following Monday, June 21 being on Saturday. One car was unloaded by Tuesday, June 24. On Thursday, June 26, the other car was only partially unloaded, and appellee, through its agent, notified Duffy, who was hauling the coke, that he could haul no more until the car service due from the delay in unloading had been paid. A controversy then arose between appellant and appellee, which resulted in the suing out of the writ of replevin on Monday, June 30, there remaining about three tons of coke in one car, which appellee had sealed and refused to allow to be removed until the car service was paid.

The evidence further shows that the cars, on their arrival on Friday, June 20, were placed on a stub-track, where they could be approached from one side and unloaded, and on the 21st of June were placed at the end of another stub-track, so that their removal was unnecessary until they were unloaded, and could be approached from both sides, for the purpose of unloading, without interference from switching so long as they remained at that point. The two cars in question came from and belonged to other railroad lines, one being from the Baltimore & Ohio Railroad Company and the other from the Illinois Central Railroad Company; that appellee had no warehouse for the unloading of bulk freight, such as car-loads of coal and coke, at Highland Park Station, and that freight such as that in question is uniformly loaded and unloaded by the shipper and consignee.

The evidence further shows that in what was called "Chicago territory," and embracing a considerable scope of country surrounding the City of Chicago, and including Highland Park, was an association called the "Chicago Car Service Association," which was a joint association including all the railroads within that territory, all of which united in the selection of a single agent, known as the "Car Service Association agent," the purpose and business of which association were to facilitate the loading and unloading of cars and for the securing of prompt service to shippers; that this agency or association had existed since 1888, and that appellee was a member of such association; that the United States, with reference to railroad traffic, was divided into forty-two districts, each having a similar association; that certain rules, designed to effectuate the purpose of such association, were formulated and published by it and observed by all its members and brought to the attention of shippers, as business between them arose and was conducted; that among the rules were rules 2, 4 and 5, as follows:

"2. Forty-eight hours' free time will be allowed for loading or unloading all cars, whether on public tracks or on private tracks, at the expiration of which time a charge of one dollar per car per day, or fraction thereof, shall be made and collected for the use of cars and tracks held for loading or unloading or subject to the orders of consignors or consignees or their agents.

"4. In calculating time, Sundays and the following holidays are excepted: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas.

"5. On cars arriving after 6 p. m. of any day, car service will be charged after the expiration of forty-eight hours from 6 p. m. on the day following."

The evidence showed that in the City of Chicago alone there were shipped in, approximately, 7,500 cars of coal and coke every month; that the average earning capacity of freight cars upon twenty-nine railroads in the association, for the year 1901, was $2.42, and on appellee's road $2.15 per day.

Under the above state of facts appellee contends that it was entitled to charge a car service or car track service of one dollar per day, after the expiration of forty-eight hours, upon these cars, and that it was entitled to a lien upon the coke, the same being the freight contained in them, for the payment of such charges. Both of these propositions are denied by appellant, and arise upon the peremptory instruction for a verdict, given by the trial court.

Under the constitution and laws of this state railroads are public highways and railroad corporations are quasi public corporations. They are chartered by the state and may invoke the right of eminent domain for the acquirement of lands necessary for the conduct of their business. Regarding them as public agencies, discharging duties in which the public is interested, the state regulates and controls their rates and tolls, both for the carrying of freight and passengers, and in many other respects regulates and controls their operation. Upon the payment or tender of the legal tolls, freight or fare, such companies are required to furnish cars and transport freight and passengers within a reasonable time, and upon their failure to do so they are subject to treble damages to the party aggrieved and in addition thereto a penalty or forfeiture to the school fund of the state. (Hurd's Stat. 1899, chap. 114, pars. 84, 85.) They must receive and transport cars loaded and unloaded over their lines, and in doing so assume the liability of a common carrier as to both such cars and freight. (Peoria and Pekin Union Railway Co. vs. Chicago, Rock

Island and Pacific Railway Co., 109 Ill., 135.) They may not discriminate against shippers in rates or facilities for shipping, and are required to make special provision for the handling and shipping of grain. All of these regulations by the state are justified and sustained upon the ground that the state is interested in the prompt and proper carriage of its products and the commerce of its people, and it would seem that reasonable rules and regulations adopted by such corporations, conducive to the proper discharge of the public duty, should, where they are not in violation of some positive law, be sustained.

Railroads, as to freights committed to their charge, during the period of transport and until they are delivered, bear two well recognized relations. While in transit, and for a reasonable time after reaching the point of destination, they owe the duties and bear the relation of common carriers; and when the car containing the freight is delivered to the consignee upon his own track or at the place selected by him for unloading, if he have one, or to the consignee upon the company's usual and customary track for the discharge of freight, with reasonable and proper opportunity to the consignee to take the same, or when placed in the warehouse of such company or the warehouse of another selected by them, in any and all such cases such companies then bear to such freight the relation of warehousemen. (Peoria and Pekin Union Railway Co. vs. United States Rolling Stock Co., 136 Ill., 643; Gregg vs. Illinois Central Railroad Co., 147 id., 550.) If the cars in which such freight is shipped are the property of another railroad than that of the company transporting the same to the point of destination, such latter company bears the same relation to such cars as to the freight therein. (Peoria and Pekin Union Railway Co. vs. United States Rolling Stock Co., supra.) Such are the duties of such companies appertaining to bulk freight in carload lots, which, it may be said, by the uniform rule and custom of this country are to be loaded and unloaded by the shipper and consignee. Small or package freight, of such character and bulk that that belonging to many distinct owners may be shipped in a single car, is commonly loaded and unloaded by the transporting company or companies. When such freight reaches the point of destination and is placed in the freight depot or warehouse of such company it is held by such company as a warehouseman, and when

a railroad company carries freight to its point of destination and stores the same in its warehouse, and the relation of warehouseman is established by the failure to remove the property within a reasonable time, the liability of a warehouseman attaches, and not the liability of a common carrier. Illinois Central Railroad Co. vs. Alexander, 20 Ill., 24; Porter vs. Chicago and Rock Island Railroad Co., id., 408; Merchants' Dispatch Transportation Co. vs. Hallock, 64 id., 284; Illinois Central Railroad Co. vs. Friend, id., 303; Rothschild vs. Michigan Central Railroad Co., 69 id., 164; Merchants' Dispatch and Transportation Co. vs. Moore, 88 id., 136; Anchor Line vs. Knowles, 66 id., 150.

It is the duty of the consignee to take notice of the time of the arrival of freight shipped to him and to be present and receive the same upon arrival, and he is not entitled to notice from the company that the same has arrived, but the company is authorized to store such freight and to be relieved of its duty as a common carrier (Merchants' Dispatch Transportation Co. vs. Hallock, supra), and when such freight is in the warehouse the railroad company may charge storage upon the same, and it has a lien upon the freight so stored for its storage charges, and this rule obtains although the company may have given the consignee notice to remove the property within twenty-four hours. Richards vs. Michigan Southern and Northern Indiana Railroad Co., 20 Ill., 405; Porter vs. Chicago and Rock Island Railroad Co., supra; Illinois Central Railroad Co. vs. Alexander, supra.

When a railroad company delivering freight at its point of destination has no warehouse at that point suitable for the storage of bulk freight in carload lots, and the property is of such character that the cars in which it is transported furnish a proper and safe place for the same, so that it is not liable to damage or deterioration arising from heat or cold or the elements, there would seem to be no reason for requiring the transporting company to seek a warehouse of another and add the cost of removal to the cost of storage when said freight may properly be held in storage in the cars in which the same was carried; and after notice to the consignee, and a reasonable time to remove the same, reasonable storage charges may be collected therefor and the freight held for the payment thereof. Miller vs. Mansfield, 112 Mass., 260; Mille

vs. Georgia Railroad Co., 88 Ga., 563; Gregg vs. Illinois Central Railroad Co., 147 Ill., 550.

In Gregg vs. Illinois Central Railroad Co. the action was for damage to grain by water, which had been stored by the railroad company in a warehouse in Augusta, Georgia. The grain was not received promptly upon arrival at its destination and was stored, and while in storage was injured by a flood. In speaking of the duty of the company with reference to such freight, this court said (p. 560): "The railroad company was not required to keep the corn in its cars on track indefinitely, and although the consignee was in default in not receiving the freight after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as warehouseman. In the exercise of such care it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might with the exercise of like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the owner."

In Miller vs. Georgia Railroad Co., supra, it is said (p. 563): "It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them; and we think where the carriers' duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may, in many cases, be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself or where it may be unloaded by purchasers as the goods are sold, thus saving dray-

age and other expenses, than to have it unloaded by the carrier and the goods stored elsewhere at the consignee's expense. And if a customer whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car by requesting or permitting the carrier to continue holding it unloaded in service and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage, and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service."

In Miller vs. Mansfield, supra, it was said: "It is not material that the goods remained in the cars instead of being put into a storehouse."

In the case at bar appellant did not discharge his duty to the appellee by being present and ready to receive his freight upon its arrival. Within two or three hours of its arrival he was notified thereof, and after it had lain there twenty-four hours and said car was placed where appellant had full and fair opportunity to remove the freight without interference in any form and to approach the car from both sides for that purpose, and when appellee's duty as a common carrier had ceased, appellant was notified that he must remove the same within forty-eight hours, or a car service or storage charge, which, under the circumstances, must be held to be the same thing, of one dollar per car would be insisted upon. Appellant also knew, by the previous dealings between himself and appellee, that such rule obtained, and unless he could show that the limit of time was unreasonable or the charge excessive, it would seem appellee's contention to charge as for storage should be upheld.

It is also urged by appellee that the right to demand such charge and enforce the same by lien arises from the unreasonable detention of the cars in question by appellant, and that such charge is in parity with and in the nature of demurrage as it exists under the maritime law, and not based upon the theory of storage charges; that it was the duty of appellant to take notice of the arrival of his freight and to be present and ready to receive the same when it did arrive, and that having failed to do this, he hav-

ing notice of the rule of the company to charge for the detention beyond the period of forty-eight hours, a car and track service in the nature of demurrage may properly be demanded. The evidence in this case shows that by the enforcement of the rule here insisted upon, the transportation facilities in the car service territory here involved was increased practically one hundred per cent., and that only about seven per cent. of the shippers or consignees, through its operation, hold their cars overtime. If such common carriers must comply with our statute and must furnish transportation for people and freight when demanded, and such companies have made proper provision in equipping their roads with an ample supply of rolling stock, and yet, because of the dilatoriousness or perversity of shippers and consignees, cars may be held indefinitely at loading and discharging points, contrary to the desires and interests of such companies, then it must be plain that the statute must either fall as a dead letter or its enforcement must work great injustice to such companies.

This precise question seems not to have been before this court previous to the present case. In 1891 the attorney general of this state, in an opinion to the Railroad and Warehouse Commissioners in complaint No. 64, Union Brewing Co. of Peoria vs. Chicago, Burlington and Quincy Railroad Co., and complaint No. 71, Lyon & Scott vs. Peoria and Pekin Union Railroad Co., said: "Section 5 of the act in relation to receiving, carrying and delivering grain in this state provides that a consignee of grain transported in bulk shall have twenty-four hours, free of expense, after actual notice of arrival, in which to remove the same from the cars of such railroad corporation. There would seem to be an implied right, under the statute, to charge for a longer detention than the twenty-four hours which the statute names. Indeed, no reason is perceived, in law or justice, why an unreasonable and unnecessary detention of cars by consignees should not be paid for; and the Car Service Association seems, from the proof before us, to be only an agency established to keep account of claims so arising and enforce them. The charges so made were thought to be reasonable, under all circumstances. * * * Demurrage is an important subject, which has arisen in a practical way only within late years and long after our statute for the regulation of railroads was passed.

It does not, however, follow that because there is no statutory regulation of the question there is no law."

Mr. Elliott, in his work on Railroads (Vol. 4, Sec. 1567), says: "But while it is probably true that this right is derived, by analogy, from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, 'we see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea.' After a carrier has completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse and keeping them, after the consignee has had a reasonable time in which to remove them. Why, then, when its duties as a carrier have been performed and a reasonable time has elapsed, is it not as much entitled to additional compensation for the use of its cars and tracks as for the use of its warehouse? Certainly a customer whose duty it is to unload, or who unreasonably delays the unloading, of a car for his own benefit, ought not to complain if he is made to pay a reasonable sum for the unreasonable delay caused by his own act. But this is not all. The public interests also require that cars should not be unreasonably detained in this way." And to the like effect are Miller vs. Georgia Railroad Co., supra; Norfolk and Western Railroad Co. vs. Adams, 99 Va., 393; 44 Am. St. Rep., 916; Darlington vs. Missouri Pacific Railroad Co., 72 S. W. Rep., 122; Interstate Commerce Commission vs. D., G. H. & M. Ry. Co., 74 Fed. Rep., 803; American Warehouse Ass. vs. Illinois Central Railroad Co., 7 Interstate Com. Rep., 556.

Nor do we think it necessary to the existence of such lien that it arise from a specific contract providing for the same, but that such right and contract may arise by implication, as in the case of warehouse charges to a railroad company that has stored goods transported by it when not received by the consignee promptly at the place of delivery. Miller vs. Mansfield, supra; Merchants' Dispatch and Transportation Co. vs. Moore, 88 Ill., 136; Illinois Central Railroad Co. vs. Alexander, 20 id., 24; Darlington vs. Missouri Pacific Railroad Co., supra; Barker vs. Brown, 138 Mass., 340.

It is claimed, however, by appellant that the case of Chicago and Northwestern Railway Co. vs. Jenkins, 103 Ill., 588, lays down the rule contrary to the views we have above expressed, and that that case should be controlling in the present case. We think not. That case seems to have related to or grown out of the shipment of goods in less quantity than a carload lot. The character of the goods was of a perishable nature, and such, if removed from the cars, must be stored, and in distinguishing that case from cases under the maritime law, and denying that the rule applicable in contracts of shipment under the latter law applied to railroad companies, it was said (p. 600): "But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee." Thus, it will be seen that the court could not have had in mind the case of the shipment of goods of the character here involved by carload lots, and where the undisputed evidence shows that the rule is that such freight shall be loaded by the shipper and unloaded by the consignee, and that railroads do not have warehouses in which to store that class of goods.

Appellant contends that the trial court erred in not permitting him to show, as tending to show whether the coke was unloaded within a reasonable time, the distance from his house to the station where said car was placed for unloading. In this, we think, there was no error. If such is the rule, and as there was 57,000 pounds of coke in this shipment, and it should appear by the evidence that the distance from the consignee's home to the station should be such that but one load of coke could be hauled a day, and that a ton at a load was all that could be hauled, taking the condition of the roads into consideration, then according to appellant's contention, he would be entitled to hold the cars in question at this place, without charge, for more than a month. Such a rule would practically take out of business, under the supposed case, the rolling stock of a company for one-twelfth of the year, to the prejudice of other shippers and to the detriment of the public interests. The correct rule must be that the consignee shall have a reasonable time, after having knowledge of the arrival of his freight, to get the necessary help and means to remove

the same; and it cannot be presumed that he is to do this by the employment of the fewest number of persons or teams that can be employed at such work, and at the same time have it said that any effort whatever is being made to remove the freight. No circumstance is shown here why a number of teams and abundance of help could not have been obtained, by proper effort, to have unloaded this coke within the forty-eight hours fixed by the rule, allowing for the Sunday; and if it could not, it cannot be maintained, as we think, that appellee should stand the loss of appellant's failure or inability to discharge his duty and perform his contract. Circumstances might arise, and doubtless will, in such cases, when, in determining what shall be a reasonable time, many things are necessary to be taken into consideration, but the distance that the commodity is to be hauled when removed from the company's cars, it would seem, should not be one of them.

It is urged, further, that a lien ought not to be accorded common carriers in such cases, but they should be left to their action upon the case or in assumpsit. There is no law preventing the sale, by the consignee, of the cargo, at the point of destination, to one or many persons who may be wholly irresponsible and as against whom suits would be unavailing. The object of such a rule cannot be so much for the recovery of a revenue as the enforcement of a rule that is to the benefit of all the shippers, and thereby a public benefit. The charge must be said to be little more than nominal, and yet the evidence discloses that its imposition in such cases has had a highly beneficial effect. No question is made as to the reasonableness of the charge, and if there were, it could have no effect in the case at bar, for the reason that appellant absolutely denies the right of appellee to any charge of compensation and made no tender of any portion of it. Russell vs. Koehler, 66 Ill., 459; Hoyt vs. Sprague, 61 Barb., 491; Schouler on Bailments, Sec. 125.

The views above expressed as to the rule obtaining to such charges, whether regarded as storage charges or demurrage or car service, seems to be in keeping with the weight of the modern decisions upon the questions, and, we believe, will tend to the public welfare.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

SUPREME COURT, STATE OF MISSISSIPPI.
OCTOBER TERM, A. D. 1903.

NEW ORLEANS & NORTHEASTERN R. R. CO.

VS.

A. H. GEORGE & CO.

UNREPORTED.

Hon. Albert H. Whitfield, Chief Justice.
Hons. S. S. Calhoun and Jeff Truly, Associate Justices.

On the 16th day of November, 1903, the following opinion was rendered and delivered by the court.

Truly, J., reversed and remanded.

STATEMENT OF FACTS.

On the 3rd day of February, 1902, A. H. George, doing business as A. H. George & Company, instituted this suit in replevin against the New Orleans and Northeastern Railroad Company for eighty-six tons of cotton seed hulls contained in five box cars in the possession of defendant company, charging that the same was wrongfully detained by the railroad company. Upon the trial the railroad company contended that the plaintiff was not entitled to the possession of the hulls because of failure on his part to pay certain "demurrage" charges which the railroad company was entitled to under certain rules of the "Alabama Car Service Association" and the Mississippi Railroad Commission. The rules referred to are as follows:

ALABAMA CAR SERVICE ASSOCIATION.

RULE I.

Per Diem Charges.

All property shipped in carload lots shall be subject to car service and trackage charges in accordance with the following regulations:

A charge of one dollar per car per day or fraction thereof shall be made for the delay of cars and the use of tracks within the following described territory, after forty-eight hours from arrival thereat, not including Sundays or legal holidays.

RULE II.

Rules for Reckoning Time.

On cars arriving during the forenoon after 7 a. m. and held for orders from consignees, car service will be charged after the expiration of forty-eight hours from 12 m. of that day, and on cars arriving after 12 m. to and including 7 a. m. of the following day, car service charges will commence forty-eight hours from 7 a. m. of the following day, provided notification has been given during that day previous to this time. Should notification not be given within the time, car service will commence forty-eight hours from the hour of notification.

On cars consigned to team tracks or private tracks and which may be so delivered on advance or standing orders from consignees, car service will be charged after the expiration of forty-eight hours from the time such cars are placed on the tracks designated.

RULE III.

Cars for Delivery on Team Tracks and Private Sidings.

Cars containing freight to be delivered on team tracks or private sidings shall be delivered on the track designated immediately upon arrival, or as soon thereafter as the ordinary routine of yard work will permit.

(a) The time consumed in placing such cars, or in switching cars for which directions are given by consignees, after arrival, shall not be included when computing detention.

(b) The delivery of cars consigned to or ordered to sidings used exclusively by certain firms or individuals located on such sidings shall be considered to have been effected either when such cars have been placed on the siding so designated; or, if such sidings be full, when the road offering the cars would have made delivery had such sidings permitted.

(c) No cars shall be held from delivery in any manner, provided it is possible to secure their delivery, and the manager is charged with the duty of seeing that the purposes for which this association is formed are not evaded by the action of any railroad company.

(d) On deliveries to sidings used exclusively by certain firms or individuals located on said sidings, and where consignees or consignors refuse to pay, or unnecessarily defer settlement of bills for car service charges, the agent will decline to switch cars to the sidings where such parties are located, notifying them that deliveries will only be made to them on the public delivery tracks of the company after the payment of freight charges at his office, and will promptly notify the manager of the action taken.

RULE IX.

Collections.

Agents will collect car service charges accruing under the rules of the association with the same regularity and promptness as other transportation charges, and the manager is charged with the duty of seeing that these rules are enforced without discrimination.

(a) It is the duty of the agent to demand car service on all cars before delivering them where car service has accrued between notification and ordering. It is also the duty of an agent, where he has any doubt about car service being paid, to demand one dollar car service at the end of the free time allowed for unloading cars, and if said car service is refused, to decline to deliver the car and to allow the lading to be taken from it, either by sealing the car, locking the car, or placing it where it is not accessible to consignee.

(b) All collections for car service charges shall belong to the road upon whose tracks the cars are detained.

(c) Railroads shall not discriminate between persons in car service charges. If a railroad company collects car service from one person, under the car service rules, it must collect of all who are liable.

RULE XII.

Storage.

No railroad company, member of this association, shall provide free storage in its freight warehouses of contents of loaded cars subject to car service charges, but any railroad company may unload cars subject to car service charges into its own warehouse or into public or private warehouses subject to the following rule and regulations:

MISSISSIPPI RAILROAD COMMISSION.

RULE I.

Railroad Companies to Give Prompt Notice of Arrival of Goods.

Railroad companies shall give prompt notice by mail or otherwise to consignee of arrival of goods, together with weight and amount of freight charges due thereon, and when goods or freight of any kind in carload quantities arrive, said notice must contain letters or initials of the car, number of the car, net weight and the amount of the freight charges due on the same. Storage and demurrage charges may be assessed if the goods are not removed in conformity with the following rules and regulations. No storage or demurrage charges, however, shall in any case be allowed, unless legal notice of the arrival of the goods has been given to the owner or consignee thereof by the railroad company.

RULE II.

Definition of Legal Notice.

Legal notice referred to in these rules may be either actual or constructive. Where the consignee is personally served with notice of the arrival of freight, free time begins at 7 o'clock a. m. on the day after such notice has been given.

RULE IV.

Demurrage on Loaded Cars, How Assessable.

Loaded cars, which by consent and agreement between the railroad and consignees, that are to be unloaded by

consignees, such as bulk meat, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone and wood, and all cars taking track delivery, which are not unloaded from cars containing same within forty-eight hours (not including Sundays or legal holidays) computed from 7 a. m. from the day following the day legal notice is given of its arrival and the car or cars are placed accessible for unloading, may be subject thereafter to a charge of demurrage of one dollar per car for each day or fraction of a day that said car or cars remain loaded in the possession of the railroad company; it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and when the period of such demurrage charges commences they are to be placed accessible to the consignee for unloading purposes on demand of the consignee; provided, however, that if the railroad company shall remove such car or cars after being so placed, or in any way obstruct the unloading of the same, the consignee shall not be chargeable with the delay caused thereby; provided further, that when consignees shall receive four or more cars during any one day loaded with lumber, laths, shingles, wood, coal, lime, ore, sand, or bricks, and all cars taking track delivery, the said cars in excess of three shall not be liable to demurrage by any railroad company until after the expiration of seventy-two (72) hours.

Plaintiff was engaged in the wholesale feed and grain business in the city of Meridian; he handled large numbers of cars of hulls, feed stuff, grain and other commodities requiring track delivery; some of these cars were unloaded at Meridian, some re-billed to other points. For convenience in unloading and handling freight, George had leased a portion of a warehouse, which was located on a spur track known as the "compress track," the larger part of which was used by the Cotton Compress Company and other concerns, and as their warehouses were situated further up the spur track all of the cars used by them had to pass over that portion of that track to the use of which George was entitled, thus necessitating the re-switching and replacing of his cars; but the lease to George was made with full knowledge on his part of this condition of affairs. George's warehouse only had trackage for four cars. It was the usual course of dealing between George and the railroad company that the cars were to be set into

his side track on arrival, without special demand, and the representatives of the Alabama Car Service Association would check the cars on the track each day to see that there was no unnecessary delay in the switching and placing of the cars. The New Orleans & Northeastern Railroad Company had also an employe who was charged with the duty of checking all cars on the track, and this double checking was recorded in books kept for that purpose and the results compared to guard against errors.

On Saturday, Dec. 7th, 1901, a train of 12 cars loaded with cotton seed hulls, loose in bulk, reached Meridian, consigned to A. H. George & Co. On arrival, this train was placed on the "storage track," appellant contending that it was necessary on account of the crowded condition of the "compress track." On Monday, 9th, the compress track being still crowded with cars, the train was switched to the "waterworks track." It was shown that at this date the railroad business at Meridian was extremely large; every track was in constant use; every car needed for the transportation of cotton and other freight. On the same day notice of the arrival of this freight was sent to George, but he declined to receive the freight bill, claiming an overcharge. George denied that the freight bills were tendered to him, but he paid the freight charges on the 12 cars of hulls on the 13th inst., and either that day or a few days thereafter had the overcharge corrected. George knew of the rules of the Alabama Car Service Association; was familiar with the provisions regarding demurrage; had paid some demurrage and had refused to pay some, and at this date had a dispute or litigation pending about another matter of demurrage.

None of the cars composing this train were placed in front of the warehouse of George; the Car Service Association's representative and the railroad company's car checker both testified that at no part of the "free time" after the arrival of this train did George have less than four cars on his side track, and an inspection of their original books corroborates this. George was notified during the free time that demurrage would accrue, and shortly after the "free time" expired he was again advised of this claim and then and there denied his liability, denied the right of the railroad company to claim demurrage and refused to pay.

The manager of the Car Service Association instructed the railroad company not to deliver the cars until the demurrage was paid.

So matters stood until about the 1st of February, 1902, when the railroad company released six of the cars to George and notified him of its intention to sell the contents of the remaining six for the demurrage on the 12. Thereupon this suit was filed for the contents of five, the hulls in the other proving worthless. At the conclusion of the testimony the court refused a peremptory instruction for the defendant and submitted the case to the jury under instructions for both sides. The jury found for plaintiff and the Northeastern Railroad Company appeals.

OPINION OF THE COURT.

TRULY, J.—This suit involves the determination of the following questions:

First—Are the rules for the collection of demurrage valid; and

Second—If so, how are they to be enforced?

Car service associations are formed by mutual agreement among the railroad companies operating in a stated territory; they owe their existence to the growth of the business interests of the country, the enormous increase in the bulk of through freight handled daily and the consequent extension of the many railroad systems handling the same. With every increase in the volume of the freight brought into a section from distant markets, hauled without unloading over the tracks of many connecting systems of the same gauge, it became more difficult for each carrier to keep track of its own cars. As the cars of each system were handled indiscriminately by every other system, they soon drifted to every quarter as the current of traffic ebbed or flowed and their whereabouts were often unknown to the carrier owning them. To correct this evil, car service associations were formed, the primary object of which was to prevent loss by keeping a daily record of every car handled by each carrier, so that each system might receive compensation for the use of its rolling stock and no unfair advantage taken by one system over another; and further

to prevent cars standing idle at one place when needed to meet the traffic and demands of another section of the country. These organizations had a beneficial effect in preventing congestion of empty and idle cars at one point while a car famine prevailed at another. But it soon became apparent that the remedy was not complete; carriers earned money by the moving of freight; the idle car produces no revenue and the car service associations found that while it was possible under its then existing rules to keep the unloaded cars moving from place to place as necessity might require, they were without power to have the freight promptly unloaded by the consignee thus securing the car for further service.

The merchant who bought goods for sale from his shelves or through his warehouse was ordinarily anxious to receive and unload his freight, but the broker who wished to do a large business with limited or no warehouse facilities found it cheaper and more convenient to use the cars of the carrier for storage purposes and thus with no expense to him wait a favorable fluctuation of price when the commodity could be disposed of to advantage and the car unloaded or re-billed to another place without unloading. To meet this contingency the demurrage rules in question were formulated and promulgated.

It should be noted that the purpose of car service associations was not to make money; they increase the revenue of the contracting carriers only incidentally in that, by keeping every car in active service, the earning capacity was constantly exerted and the returns therefrom increased; but the prime object of their formation was to observe and promote the mutual interests of the carriers and the public dealing with them, by improving the service of the traffic department and insuring the prompt handling and speedy delivery of freight to the consignee.

It is admitted that the amount charged under the demurrage rules is reasonable, and it appears to us that the rules in themselves are fair and based upon the fundamental maxim of justice, "the greatest good to the greatest number." The carrier of freight is responsible in damages if it unreasonably delays the transportation of freight delivered to it and exact justice demand equal diligence of the consignee.

When freight has been transported to its destination and the consignee legally notified of its arrival it then be-

comes the duty of the consignee to promptly receive the same, so that the car may again be placed in service. These rules work no hardship to the consignee who displays proper diligence in the handling of his freight ample time is granted him, but they prevent the dilatory dealers who seek to save storage or warehouse charges from keeping the track blocked with idle cars, thereby impeding the carriers in the prompt handling of freight and depriving other dealers of the use of necessary cars to haul their freight or transport the product of the country to market.

Certainly no reason founded in justice, can be given why consignees should not pay for any unreasonable or unnecessary detention of cars. Prompt handling of freight by both carrier and consignee is for the best interest of both and of the commercial world at large.

The question was never before in this court, but this view is in full accord with an almost unbroken line of decisions in other states, and precedent aside, it is supported by justice and right. Norfolk & W. R. Co. vs. Adams, 90 Va., 393, 22 L. R. A., 530; Kentucky Wagon Mfg. Co. vs. O. M. Ry. Co., 98 Ky. 152, 36 L. R. A., 850, and cases cited. They have also been approved by the railroad commissions of various states who are charged with the duty of guarding the interest of the public.

It is well settled that railroad companies may make reasonable rules and regulations, not to limit their own duty or liability, but for the convenient transaction of business between themselves and the shippers of freight over their lines.

Having reached the conclusion that the rules imposing reasonable demurrage charges upon dilatory consignees are fair, just and enforcible, we now pass to a consideration of the manner of their enforcement.

It may be borne in mind that the duty of the railroad company as a carrier of freight terminates under the decisions of our court when, the freight having reached its destination in good order the consignee is legally notified of its arrival, after that time the railroad holds as warehouseman and bailee for hire. But in the present case whether appellant held as carrier or as warehouseman and special bailee it was in either of these capacities, rightfully in possession and had the right to retain that possession until its legitimate charges were paid. This is a suit in re-

plevin in which right of possesson is the only question of law involved. If there was any sum due appellant, whether little or much, the verdict should have been that it retain possession.

It is earnestly insisted that the railroad company has no lien on the freight for demurrage charges either by statute or at common law. It may be true that there is a technical distinction between the lien here claimed and the common law lien, though the difference is more imaginary than real; but it is undoubtedly true that the warehouseman as bailee for hire has a lien for his reasonable charges and this is recognized as to warehousemen by the express terms of Section 2108, Code 1892, in which a lien is given for freight and storage coupled with a power to sell in a manner therein pointed out. If a carrier has a lien for storage charges if the freight is unloaded into a warehouse upon what principle can it be denied if by the action of the consignee the cars themselves become his storage houses? Particularly when, as in this case, the consignee knows in advance by his course of dealing with the carrier that the charges will be incurred if he delays in receiving his freight. In our judgment, by necessary implication the Code Chapter on freight and storage carries with it the necessary lien to enforce the collection of all reasonable charges incident to the handling of freight. In a case of this character, involving the dealings of a carrier and public, the courts will not narrowly restrict the meaning of a statute, but will rather "expand the principles" of law and "fit them to the exigencies of the occasion," as was aptly phrased by the eminent jurist, Chief Justice Cooper, in discussing a similar proposition (66 Miss., 555). Knowing the rules governing the transaction, the voluntary action of the consignee gives an implied assent to the charge and lien which those rules assert.

By the sole action of the consignee the carrier is forced to retain the possession of the freight; by operation of law, it is required to keep, store and care for the property of another; it is under the law entitled to compensation for its services in this connection and the law gives it a remedy to enforce its right. In the case of Wolf vs. Crawford, 54 Miss., 514, our court, in discussing the right of a carrier as a bailee, said: "But the right of the general owner (of the freight) to be restored to the possession is dependent on the payment or tender of the freight and other charges

on the goods of the carrier. For these he had a lien which would be lost if he had parted with the possession; and he cannot be compelled to make delivery until they are discharged. The general owner cannot dispossess the carrier of the goods without payment or tender of his legal demands upon them."

Again:

"But a bailee until the condition of the bailment have been accomplished has a property in the chattels and the possession which is exclusive, both as to the general owner and strangers his right and possession extend to the entire property; nor can the bailor, or any one claiming through him, interrupt and defeat his rights until a satisfaction of his claim or an offer to do so. The common carrier, warehouseman and all the class of bailees who have a beneficial interest have a right of possession and a lien in the thing. These rights are inviolable until the acts and purposes for which they were created are performed."

In Miller vs. Ga. R. R. Co., supra, after stating the general rule that a carrier had a right to collect reasonable storage, the opinion proceeded:

"We do not think it material as affecting the right to make a charge of this character that the goods remained in the car instead of being put into a warehouse." (28 Am. Eng. Ency. L., 663; Dixon vs. Central of G. R. R., 35 S. E. R., 369; Barker vs. Brown, 138 Mass., 240).

There is no force in the argument which conceded the right of the carrier to make demurrage charges but contends that the goods be delivered and then the carrier sue for the amount. This course would give the dishonest and insolvent an unfair advantage and would breed a multiplicity of suits.

It is contended for appellee that whatever may be the general rule in the instant case, the appellant should be defeated of its recovery because it failed to bring itself within the rules allowing demurrage in this. It failed to notify the consignee in the manner pointed out, and it failed to tender delivery of the freight as required by the rules of the car service association. As to the first contention, it is enough to say that the object of the rule was reached and the law fully complied with when George was advised

of the arrival of the twelve cars, though, if the testimony of all, as supported by the entries in his notice book, be true, the rule was literally complied with.

As to the second contention, there is conflict as to the fact. It is true that the cars were not in fact placed in front of George's warehouse, but the testimony does not clearly show that it was the fault of the appellant. On the contrary, the testimony of Fewell, the representative of the Car Service Association; of Lowery, car checker of appellant company, supported by the contemporaneous entries in their record books, if believed by the jury, show conclusively that during all of the "free time" to which appellee was entitled under the rules, placing in front of George's warehouse was prevented by an accumulation of cars consigned to George himself. This is contradicted by Shepherd, car checker for appellee, while appellee himself testified that "there was no place to deliver them; they had our track full of cotton."

With the sharp conflict of testimony on this point, Clause "B," of Rule III, must be considered. "The delivery of cars consigned to or ordered to sidings used exclusively by certain firms or individuals located on such sidings, shall be considered to have been effected either when such cars have been placed on the sidings designated; or, if such sidings be full, when the road offering the cars would have made delivery had such sidings permitted.' It was claimed by appellant that the cars would have been placed on siding on arrival had the siding permitted; there is much proof that the siding was full. Whether the siding was filled with cars consigned to George or to the Cotton Compress, in either event appellant was excused from delivering upon the siding. If George had his full quota of cars, then he had no ground of complaint. If the siding was filled with cars for Compress, it had equal right to use of siding and appellant is not liable.

The court correctly instructed the jury on the point by fifth instruction for defendant, but also gave the second instruction for plaintiff, and in the light of our conclusions, this was error. By this instruction the jury was told that it devolved upon defendant to prove by a preponderance of the evidence that it notified plaintiff of the arrival of the cars, and placed them on the side track adjacent to plain-

tiff's warehouse, or "to show circumstances of excuse or justification therefor."

This was misleading. By it the determination of certain questions was submitted to the jury, whereas, in fact, the questions were not in dispute. The jury did not have to pass on the question of notice; George's own testimony leaves no doubt of his knowledge of the arrival of the cars. In the light of the instructions for the defendant the jury were left in doubt as to what was meant by "circumstances of excuse or justification therefor." To sum up the sole question of disputed fact involved in this record, is: was the siding so filled with cars consigned to George, or to others entitled to use the side track as to prevent the railroad company placing the cars until after the expiration of the "free time." If so, the railroad was entitled to the verdict; if not, George should recover. Upon this sole question is there sufficient conflict to justify the submission of the cause to the jury for determination.

The ingenious but fallacious argument is made that the railroad company should not be permitted to claim the fact, if fact it be, that the siding was full of cars consigned to the Compress as "an excuse or justification," in the language of the second instruction for plaintiff, for the failure to place the cars in question, because of the unjust favoritism shown the Compress Company by the railroad company in not charging demurrage on cars loaded with cotton. This is not within the condemnation of the rules. Clause "C," Rule 9, prohibits discrimination between persons, and says that if the car service be collected from one person it must be collected of all who are liable. This is to prevent discrimination between persons handling cars loaded with the same class of freight. So that if car service is collected from one dealer handling hulls, or flour, or grain, or other class of freight, it must be collected from all dealers handling the same class of freights. But in the instant case, car service was collected from no car loaded with cotton or coal, no matter by whom handled, anywhere within the territory covered by the Alabama Car Service Association. It is to be seriously doubted whether, under the undisputed testimony of the assistant manager of the Alabama Car Service Association, the carriers have the authority to impose car service on the cars loaded with cotton or coal. We know of no reason why we should condemn as unlaw-

ful or unjust the exemption of cars loaded with cotton or coal from car service charges, while many reasons present themselves to commend the equity of the rule. In construing the language of said second instruction the jury might well have inferred, in considering all the instructions together, that even though the siding was filled with cars for George or the Compress this was no "excuse or justification" for the appellant because no car service was collected of the Compress. And this position is not maintainable.

For the error in giving the second instruction for plaintiff above referred to which is in itself erroneous and misleading and is in conflict with the other instruction for both plaintiff and defendant, the case is reversed and remanded and a new trial awarded.

As a new trial must be awarded for the error indicated, one further question presents itself for decision: Did the railroad company forfeit its claim for demurrage upon the six cars released by releasing the six cars and holding the remaining six for the charges upon the entire twelve. The twelve cars in question constituted one shipment belonging to one owner received at the same time; further, a different amount of demurrage was due (if any was due) upon four cars from what was due upon the remaining eight there was no way to distinguish the four cars from the eight except by arbitrary selection. The cars were all loaded with the same commodity loose in bulk.

In 28 Am. and Eng. Ency. L. the rule is stated: "The lien (for storage charges) is a right to retain possession of the goods until the satisfaction of the charges imposed upon them; it is specific upon the goods stored for the particular charges for such storage, although the entire lien extends to every parcel of the goods stored at any one time."

In Schmidt vs. Blood, 24 Am. Dc., 143, it is said: "A warehouseman has a lien upon the balance left in his hands of an entire lot of merchandise entrusted to him at the same time, after delivery of part for the storage of the whole. And the same conclusion is reached in Steinman vs. Wilkins, 42 Am. Dec., 254, a thoroughly well reasoned case and fully supported by citation of numerous authorities.

In Penn. Steel Co. vs. Ga. R. R. & B. Co., a recent case reported in 94 Ga., 636, it was decided that a railroad company had the right to retain from each consignment one or more cars to secure itself for the freight and demurrage it claimed on such consignment. And we think this the true and just rule, supported by reason and the more modern decisions.

We are unable to see why it should be required of the carrier that it retain twelve cars loaded with a commodity, belonging to the same owner, when the contents of a fewer number of the cars is sufficient to liquidate its charges on all, especially in a case where, as in the instant case, a dispute has arisen as to the validity of the charges claimed, and the consignee is willing to receive the contents of the other cars. As stated, the conclusion of the Supreme Court of Georgia occurs to us as being the just, sensible and convenient rule. It avoids the sale of a large amount of freight for the collection of a trifling sum; it saves the consignee the possibility of a loss by the sacrifice of his property at a forced sale, and it gives the carrier the speedy use of its cars for the moving of other freight. We note nothing in the rules under consideration forbidding such action, and it commends itself to us as being the proper course.

If the question of fact be decided in favor of appellant that it is entitled to demurrage in this case, the six cars retained by it are liable to the charges for the entire twelve constituting the shipment.

For the reasons hereinbefore stated, the case is reversed and remanded.

I, George C. Myers, Clerk of the Supreme Court of Mississippi, do hereby certify the foregoing to be a true copy of the opinion of said court, delivered in the cause hereinbefore stated, as the same appears of record in my office.

In testimony whereof I hereunto set my hand and seal of said court at office at Jackson this 19th day of November, 1903.

GEORGE C. MYERS, Clerk.

DISTRICT COURT, BLACK HAWK CO., IOWA.
JANUARY TERM, A. D., 1904.

UNREPORTED.

Iowa Statute under which Ill. Central, C. G. W. and C. R. I. & P. were Indicted for Conspiracy in Agreeing to Car Service Rules, Declared Unconstitutional.

FACTS.

August 1, 1902, car service rules became effective throughout a large portion of Iowa. Townsend & Merrill, a lumber firm, doing business at a number of points, took counsel of state authorities, and refused payment of the first charges accruing; cars were, therefore, held for car service due, which was later paid under protest. Indictments, based on above action, were then secured against the Illinois Central Railroad Company, Chicago, Great Western Railway Company, and Chicago, Rock Island and Pacific Railway Co., through the grand jury at Waterloo, Iowa.

STATUTE CLAIMED TO HAVE BEEN VIOLATED.

Iowa Code, Sec. 5060, Pools and Trusts. Any corporation organized under the laws of this or any other state or country, for transacting or conducting any kind of business in this state, or any partnership, association or individual, creating, entering into or becoming a member of or a party to any pool, trust, agreement, contract, combination, confederation, or understanding with any other corporation, partnership, association, or individual, to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, shall be guilty of a conspiracy.

Sec. 5062, Penalty. Any corporation, company, firm or association violating any of the provisions of the two preceding sections shall be fined not less than one per cent. of its capital or amount invested in such corporation, company, firm or association, nor more than twenty per cent. of the same; and any president, manager, director, officer, agent or receiver of any corporation, company, firm or association, or any member of any corporation, company, firm or association, or individual, found guilty of a violation thereof, shall be fined not less than five hundred nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or both.

Sec. 5065, Forfeiture of Charter. Any corporation created or organized by or under the law of this state, which shall violate any provision of the five preceding sections, shall thereby forfeit its corporate right and franchise, as provided in the next section.

EXTRACTS FROM DECISION.

(Hon. Franklin C. Platt, District Judge.)

"The indictment charges that the defendants did conspire together 'to fix the time allowed shippers for unloading any commodity from a car upon the railway of any member of said unlawful combination without charge, and to fix the charge for the shipper detaining said car for a longer period than forty-eight hours.' The defendants demur generally and specifically to the indictment. * * * The contention is that the statute is unconstitutional in that it is in contravention of the Fourteenth Amendment to the Constitution of the United States, which is as follows:

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

No question is raised that the legislature did not have the power to enact Section 5060 of the Code, but it is urged that the penalty provided by Section 5062 deprives the defendants of the equal protection of the law. * * * The minimum fine as to the defendants would be, say $600,000, $680,000, and $1,000,000 respectively, while the maximum penalty would be $12,000,000, $13,600,000, and $20,000,000 respectively. But the offense of such defendant is the same, yet one might be required to pay as a penalty $6,400,000 more than another.

This inequality in the protection of the law is slight, however, compared to that when the penalty attaching to a violation of the statute by an individual or by an agent, officer of a corporation, or member of any firm or association, is considered. As to such persons the minimum fine is $500 and the maximum penalty is $5,000. Thus, while a corporation is guaranteed the equal protection of the law, one of these defendants might be fined $19,995,000 more than could be imposed upon an individual, or upon an officer or agent of any corporation, company, firm or association, for the same offense. Such statutes have been uniformly held to be unconstitutional.

In the case of Gulf, Colorado & Santa Fe Railway Co. vs. Ellis, 165 U. S. 150 (quotes): in Leeper vs. Texas, 139 U. S. 462 (quotes); in Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79 (quotes); in Connelly vs. Union Sewer Pipe Co., 184 U. S. 560 (quotes); in Babier vs. Connelly, 113 U. S. 27 (quotes); in Cooley's Const. Limitations, 5th Ed., (quotes).

Another serious objection of the act is the further penalty provided by Section 5065. Here is a clear violation of the constitutional right, in that a very heavy additional penalty is imposed upon domestic corporations, while foreign corporations may escape by paying the fine imposed under Section 5062. If the act is constitutional the corporate right and franchise of the defendant Chicago, Rock Island and Pacific Railway Co. must upon conviction be forfeited, while the defendant, Illinois Central Railroad Co., being an Illinois corporation, would retain its corporate franchise and the right to transact business in this state.

The 8th amendment to the Constitution of the United States and the Constitution of Iowa provide that excessive fines shall not be imposed. If the defendants are guilty as

charged in the indictment they have committed no heinous crime, yet the minimum aggregate fine would be $2,280,000 of which the county attorney would be entitled to the sum of $456,000. In addition to this fine the corporate franchise of one of the defendants would necessarily be forfeited.

I do not think the indictment charges the commission of the offense defined by the act under which it was found. The statute prohibits any combination to regulate or fix the price of any article of merchandise or commodity. If any commodity was affected by the alleged combination, it was no doubt, the use of the car by the shipper. But the indictment does not charge that there was any combination or understanding between the defendants to fix the charge for such use. It charges that the defendants combined together 'to fix the charge for the shipper detaining said car for a longer period than forty-eight hours.' The detention of a freight car is not a commodity.

The demurrer is sustained.

The state excepts."

UNITED STATES CIRCUIT COURT.

CHICAGO COAL SHIPPERS' ASSOCIATION

VS.

CHICAGO CAR SERVICE ASSOCIATION

Hon. S. H. Bethea, United States District Attorney, Chicago, Illinois.

Sir: In order that you may have complete information as to the organization and purposes of the Chicago Car Service Association, when you take up for consideration the bill the Commissioner of the Coal Shippers' Association of Chicago has asked the government of the United States to file against the Chicago Car Service Association, the following statement is respectfully submitted:

Prior to the organization of the Chicago Car Service Association, November 1, 1888, an intolerable condition of misuse of the freight car equipment of railways by consignees had for a long time prevailed, and notwithstanding the efforts made to stop the abuses, no influence which the roads individually could bring to bear was of any effect in improving the situation.

The person who, with a desk for an office, could solicit a consignment of freight, would, upon its arrival, take a sample and go about the city to effect a sale, and, failing to find a customer to accept his terms, would hold the car upon the tracks of the railway company without expense to himself until it suited his purpose to remove the freight. When the patience of the first railway company was, after many days and sometimes weeks, finally exhausted, he would upon payment of a small switching charge, order the car switched to the tracks of another railway company, there to repeat the operation, and so on from one railway company to another, until not infrequently months would be consumed before the car would be unloaded. This proceeding, carried on simultaneously by many individuals, each handling numbers of cars, congested the railway terminals and tied up a vast amount of equipment.

Freight was allowed in many instances to remain in cars on sidings until the same deteriorated and depreciated in value so that the railway companies could not by sale realize sufficient to satisfy freight charges. Cars of coal in some instances were held under load until vegetation a foot or more in height grew thereon, and in other cases spontaneous combustion occurred, damaging or destroying the car, and threatening the property in the vicinity of the same.

Again, many manufacturing establishments would order large supplies of material in order that they might take advantage of a favorable price or other special condition of the market. When, owing to their lack of storage facilities, they were unable to unload the freight upon arrival, they would hold the cars indefinitely to suit their convenience.

Consignees with cars on team tracks that were favorably located, by unnecessarily delaying the unloading of the same compelled other consignees to wait their turn, or to unload their cars on less favorably situated tracks.

In general a feeling of indifference prevailed on the part of consignees, and no considerations other than convenience or economy influenced them in releasing the equipment of the railway companies.

This state of affairs existing at their terminals seriously crippled the capacity of the railway companies to adequately serve the public.

The situation at Chicago was not different from the condition that existed at other terminals throughout the country. Twenty-one railway companies, with lines stretching out and connecting with the entire railway system of the United States, had their terminals in the City of Chicago. Freight coming in over these twenty-one lines and terminating at Chicago could be divided into two classifications:

(1) Freight originating beyond or on a Chicago line, and delivered on that line at Chicago.

(2) Freight originating beyond or on a Chicago line, and delivered at Chicago through one or more connecting lines.

From 10 to 50 per cent. of the freight consigned to Chicago was delivered upon the terminals of lines that did not originate the business or bring it into Chicago. To illustrate: A car owned by the Chicago & Northwestern Railway Company, loaded with freight originating either beyond or upon its own lines, could be switched for unloading to a terminal point on the tracks of any of the other twenty railway companies having terminals at Chicago. The Chicago & Northwestern Railway Company had no control over this car after it was switched to the tracks of another terminal railway company in Chicago over which the car might go to reach its destination. This illustration applied to all cars that are unloaded at Chicago.

The result was that unless there was some uniform and reciprocal understanding with reference to the handling of cars at Chicago after they left the lines of the railway which owned and operated them, it might happen that any railway company would be entirely divested of its rolling stock and equipment for the accommodation of patrons of other railway companies.

Without a uniform and reciprocal understanding between railway companies to expedite the loading and unloading of each other's cars, it might have become necessary for a railway company to refuse to permit its cars to go beyond its own line. This would have required the shipper to reload the freight into cars of other railway companies at junctions with connecting lines. The interference and annoyance that would have resulted to interstate commerce from such practice was manifest.

To meet this difficulty, prior to the organization of the Car Service Association the railway companies, by the application, separately and individually, of car service rules, tried to hasten the movement of their own cars on the lines of other railway companies. These rates were not uniform and this plan was found to be impracticable, for the reason that the elements of uniformity and reciprocity between railway companies doing an interchange business were entirely lacking. The business necessities of the country demanded that the railway companies enter into a uniform and reciprocal arrangement with reference to the use of each other's cars when they were allowed to go beyond the jurisdiction of the tracks of the owner of the cars.

At a terminal point like Chicago, where twenty-one railway companies were doing an interchange business, it became manifest that it was necessary to have an association or clearing house that would keep track of the movements of all the cars, and would see to the enforcement of reasonable car service rules.

In such an arrangement there could not be reciprocity without a uniform rate upon all of the railways in the Chicago district. Detentions within the territory wherein a lesser rate was charged would be greater than in the territory wherein a higher rate was charged. In addition to this, many large business interests receiving freight by several lines, in the absence of a uniform car service charge, would be subjected to various and fluctuating car service rates. Smaller business interests, doing business solely over one line, might frequently be placed at a disadvantage in competing for business with those doing business over another line, owing to the difference of car service rates as between the two lines. To illustrate, the cars of the Chicago, Burlington & Quincy Railroad Company went to destinations upon the tracks of every other railway

company in Chicago, and if each railway company had its own rate for car service, independent of the car service rates of other railway companies, there would have been as many different rates upon the cars of the Chicago, Burlington & Quincy Railway Company as there were railway companies in Chicago.

To meet this situation, it was decided by the railway companies, that a car service association should be organized to secure the prompt loading and unloading of cars, and to enforce a reasonable and uniform charge of one dollar per day for unreasonable detention of cars.

On November 15, 1888, the following circular was published in the daily papers of the City of Chicago, and distributed to the patrons of the railway companies:

"To Consignors and Consignees of Freight in Chicago and Vicinity.

"Gentlemen: Having in view the inconvenience and loss to patrons and railroads alike, consequent upon the inability to promptly provide cars requisite for the handling of freight, and believing that such trouble is mainly due to the delay in unloading and loading of cars, the railroad companies have resolved to make an effort to largely reduce, if not abolish this evil.

"In their efforts to accommodate their patrons, the railroads have permitted an abuse of their equipment, which has become intolerable. They fully realize that their own laxity of method is largely responsible for this abuse, and they desire, in applying the remedy, to exercise due moderation, and give no occasion for complaint.

"Notice is hereby given that on and after the 19th day of November, 1888, there will be made a minimum charge of one dollar per car per day, or any fraction thereof, for the use of cars not loaded or unloaded within forty-eight hours after being placed in position to load or unload.

"The railroads desire it understood in adopting this plan that the amount will not compensate them for the loss occasioned by the use of their cars and tracks for warehouse room, and that they will be best pleased when there is least to collect.

"It is manifestly unjust that the shipper who has invested in real estate, warehouse and other appliance

should have these advantages neutralized by the use of cars as storage room by his competitor, who has not invested a dollar in similar facilities, and who, in tying up and rendering useless for long periods the railroad equipment of the country, contributes to a scarcity of cars which injures not only the railroads, but all their patrons.

"That there may be no discrimination in the enforcement of the rules and collection of the charges herein announced, the entire matter has been placed in charge of an organization which will act for all interests alike."

This circular was signed by twenty-one railways with terminals in Chicago.

The rules put into effect by the foregoing notice are set out in full in Appendix "A." (Ususal Car Service Association rules).

The effect of the enforcement of these rules was immediate. The congestion of cars upon the terminals of the railways in Chicago was relieved, and the entire situation at once became greatly improved.

Prior to the enforcement of the rules above referred to few railway companies kept a systematic record of the detention of cars. The records of the Chicago and Eastern Illinois Railroad Company, then and now a prominent coal carrying road, forcibly illustrate the advantages derived from the enforcement of these rules. The experience of that line is shown in the following statement:

Average detention before inauguration of car service rules.		Average detention after inauguration of car service rules.		Decrease in average time of unloading cars.
Month.	Avge. days.	Month.	Avge. days.	
Dec. 1887	12.20	Dec. 1888	3.22	8.98 days per car.
Jan. 1888	10.60	Jan. 1889	3.15	7.45 " " "
Feb. 1888	12.40	Feb. 1889	2.52	9.88 " " "

During the two months immediately preceding the establishment of car service rules the average detention in unloading cars on the tracks of this road at Chicago was in September, 1888, 15.50 days, and in October, 1888, 14.10 days.

In the case of the Chicago and Alton Railroad, the following statistics have been obtained:

Dec. 1887,	Avg.	8.00 days	Dec. 1888,	Avg.	2.30 days	Decrease	5.70 dys
Jan. 1888,	"	6.50 "	Jan. 1889,	"	1.90 "	"	4.60 "
Feb. 1888,	"	6.00 "	Feb. 1889,	"	1.52 "	"	4.48 "

The experience of the Atchison, Topeka and Santa Fe Railway was as follows:

Dec. 1887,	Avg.	10.18 days	Dec. 1888,	Avg.	2.37 days	Decrease	7.81 dys
Jan. 1888,	"	8.64 "	Jan. 1889,	"	1.96 "	"	6.68 "
Feb. 1888,	"	8.17 "	Feb. 1889,	"	1.58 "	"	6.59 "

During the two months just prior to the adoption of the rules the average detentions were 9.29 days for September and 9.49 days for October.

The records of the association show a steady decrease in the average daily detentions of cars on all roads for the first three months of operation under the car service rules, the number of cars reported and the average detention for each month being as follows:

	Cars handled	Average detention.
December, 1888,	69,010	2.37 days
January, 1889,	55,712	2.19 "
February, 1889,	55,314	1.94 "

So successful were the results obtained that within two years twenty-two car service associations were formed at different points, covering pretty generally the territory between the Great Lakes and the Gulf, Denver and the Atlantic coast. A compilation of the operations of these associations shows that during the months of May, June and July, 1890, there were handled under car service rules 1,220,382 cars, the average detention per car being 1.64 days, against an average detention before car service rules became operative of over four days in the East and six to eight days in the West.

In 1891 some trouble began to be experienced by railway companies whose lines ran through the territory of more than one car service association, over variations of practice and time allowances for the loading and unloading of different commodities, occasioning much embarrassment to the railroad companies and frequent charges of discrimination from patrons. For instance, one railroad company, a member of several different associations (in each association handling for the same individual, firm or

corporation, some particular commodity upon which in one territory 48 hours' time was allowed, in another additional time was given, and in a third still more time was allowed), could not explain upon any reasonable basis why the same car containing the same commodity should under substantially the same conditions have while upon the same railroad different time allowances at different places. The result of an investigation extending over nearly the entire country, showed that about 95 per cent. of the cars reported to the various associations were released within the time limit of 48 hours. As this allowance was found to be well adapted to requirements, it came to be generally adopted as the standard.

The administration of car service rules throughout the country has from the outset been placed in the hands of bureaus known as car service associations, each under the charge of a manager. Under the intelligent and impartial administration of the rules by the managers of the various associations, the usefulness of car service regulations has increased steadily from year to year until the calendar year 1903 there were handled by the car service associations of the country, 28,634,020 freight cars, upon which the total average detention per car was but 1.69 days.

Results equal to those obtained at Chicago in 1888 were obtained at other and smaller points at later dates by extending the jurisdiction of the association.

Notice was served July 15, 1902, that association rules would apply at Joliet, Illinois, beginning August 1st of that year. Records have been secured for 560 cars held on the tracks of the Elgin, Joliet and Eastern Railway at Joliet for 40 days or more which were handled previous to August 1, 1902; the total detention for such cars was 41,906 days, the average 74.83 days; 54 of the cars were held more than 100 days.

The average detention in days for cars held by the Elgin, Joliet and Eastern Railway at Joliet, Illinois, from June 1 to October 30, 1902, by months, was as follows:

June,	1902,	8.29 days	Prior to the adoption of car service rules.
July,	"	4.28 "	
August,	"	1.41 "	After the adoption of car service rules.
September,	"	1.19 "	
October,	"	1.06 "	
For the year	1903,	1.50 "	

During the period of nearly sixteen years that the Chicago Car Service Association has been in existence the number of cars handled has increased from about 600,000 the first year to 1,828,045 for the year 1903. Ninety-two and eighty-seven hundredths per cent. (92.87) of the cars reported during the past year were released within the time allowed for unloading, and the total average detention of cars by consignees was 1.71 days.

The rules of the association have been adjusted from time to time to establish a better understanding of those functions which are the obligation of the carrier, and those which constitute the proper duty of the shipper or consignee.

The Agreement and Rules of the association in force at the present time are attached to this statement as Appendix "C."

The principles underlying the Rules are as follows:

1. Any action or omission on the part of a shipper or consignee which operates to cause unreasonable delay in the movement of a car or its release for further service, is made the basis of a charge for such use or detention of the car.

2. No charge is made against a shipper or consignee for any detention of a car for which he is not responsible.

3. No car service charge is ever made until after reasonable time has been allowed for the use of the car, and a reasonable charge is then made for such further detention of the car as may be desired by the person in control of it.

4. All car service charges are based on the rate of one dollar ($1) per car per day, for the working days of the year; no charge being made for Sundays and legal holidays.

5. All storage charges are based upon the car service rate, and are as nearly as may be an exact equivalent.

6. Concessions to public necessity and to established customs of trade have been made by the allowance of additional time on coal and coke, grain, baled hay and straw. Further concessions are made by exemption of commodities likely to be injured by inclement weather.

7. In cases of doubt and where justice demands it, the manager is vested with authority to give relief from charges which have accrued and to order the refund of charges collected.

8. To interpret the rules equitably and to direct their application justly and alike for all railroads, shippers and consignees, the manager is given supervision of all cars within the territory of the association.

9. The organization of which the manager has charge consists of inspectors, accountants and the necessary clerical force to enter upon the records the car reports received daily from the different railways. No car service or storage charges are collected by the manager or any employe of the association; the function of the association being merely that of a bureau of record, inspection, supervision and adjustment.

In addition to the strictly railroad considerations, there are economic principles underlying the rules, the consideration of which is essential to a full understanding of the car service question.

In a limited sense the function of a railway company is to furnish cars for the movement of freight. From movement only does it derive adequate revenue. Its highest interest, therefore, is to stimulate such movement that the largest number of cars may with the greatest frequency be used for freight transportation. These considerations, therefore, impel the railways to place their car equipment promptly at the disposal of shippers, require the cars to be promptly loaded, move them expeditiously to their destinations, and there to be unloaded with reasonable diligence that they may again become available for loading.

These considerations have little influence with the shipper and still less influence with the consignee.

In this connection attention is called to the Coal Shippers' Association of Chicago, at whose instance this bill is sought to be filed. This Association consists of sixty-two members, of whom only three are exclusively miners of coal. Of the others, twenty have some interest in mines, but are primarily jobbers and many of them retailers. Thirty-nine are exclusively coal dealers. The membership is, therefore, made up of those whose primary interests

justify their classification as three producers and fifty-nine dealers in coal. Of these sixty-two members, fifteen only have yards in which a supply of coal may be stored for the purpose of conducting their business. The remaining forty-seven members are dependent at Chicago entirely on track facilities of the railway companies and the use of cars for storage purposes. As it is necessary for coal dealers to carry at all times some stock of coal on hand, such dealers as the forty-seven above referred seek to use cars for storage purposes, and the resulting expense of car service has always been to them a source of contention.

Car service rules stand as a bar to the control and manipulation of the soft coal market of Chicago. So long as the regulations of the railway companies compel the prompt unloading of cars, the supply of coal for current use in the city is ample, and there is a rapid return of cars to the mines for reloading, with the result that the mines are regularly operated, the current of traffic steadily maintained by the railways, the consumers in the city abundantly supplied, and normal prices prevail in the coal market.

The miners of coal and likewise the consumers, are dependent entirely upon the supply of cars to maintain normal conditions. The movement of coal to Chicago is an unending stream, and so inadequate now are the storage facilities of consignees that the city is dependent upon the daily movement of cars to maintain its supply for even a short time. Any interruption or a cessation for a few days of the coal movement of the railway companies will produce a shortage of coal. While the rules of the car service association cannot prevent the holding of cars for speculative purposes in times of serious disturbance and cessation of work at the mines, they ordinarily exert a deterrent effect upon manipulation of the supply and speculation in the price of coal.

It will be seen from the above that the car service charges are not a fixed charge upon all freight coming into Chicago, but only originate by reason of the action of the shipper or consignee. Ninety-three per cent. of the freight handled at the terminals in Chicago does not pay any car service charges. The Car Service Association is one of the few associations in the commercial world that, as its efficiency to the public is increased, the revenues of its members from car service decrease.

In 1888, prior to the formation of car service associations, the average detention to cars under load was, as near as can be ascertained, at least five days per car. In 1903, after the car service association rules had been in force and effect for a period of fifteen years, the average time was 1.69 days per car. The usefulness of the association is conclusively demonstrated when it is considered that in 1903 28,634,020 cars were handled by car service associations. Computing the time consumed in loading and unloading on the five day basis existing in 1888, for these 28,634,020 cars there would have been 143,170,100 car days consumed in 1903. Computing the time consumed in loading and unloading on the 1.69 day basis existing in 1903, for these 28,634,020 cars there were 48,391,494 car days actually used. A saving was thereby effected in the year 1903 under the operation of the rules of car service associations of 94,778,606 car days, equal to the service of 315,928 cars for the three hundred working days of the year, or 21½ per cent. of the entire freight car equipment of the country. To withdraw the service of such a number of cars would put the railway companies back for equipment to their status for the year 1900, with the result at the present time that they would be unable to meet the transportation requirements of the country and a disastrous car famine would ensue. These figures conclusively prove that a car service association does not restrain but facilitates commerce.

It is respectfully submitted that a car service association at every large commercial point where there are many connecting lines is a public necessity, to prevent inefficiency in the operation of the railways and to secure the release of equipment for further use in the channels of commerce. It conserves and promotes the interests of the public and of the railway companies by the equitable distribution and fullest use of the freight car equipment of the country.

Respectfully submitted,

C. W. SANFORD,

Manager Chicago Car Service Association.

Chicago, Illinois, May 5th, 1904.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 30 1906
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October Term 1905.

No. 370
and
No. 594.

FRANKLIN McNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, AND THE GREENSBORO ICE AND COAL COMPANY,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal From the Circuit Court of the United States for the Eastern District of North Carolina.

Cross Appeal in Same Case.

Opinion of United States Circuit Court of Appeals Fourth Circuit.

Appendix C to Brief of

FABIUS H. BUSBEE,
CLAUDIAN B. NORTHROP,
Solicitors for Southern Railway Company.

ited States Circuit Court of Appeals

FOURTH CIRCUIT.

No. 623.

TED STATES OF AMERICA, EX. REL., GREENBRIER COAL AND COKE COMPANY, Plaintiff in Error,

versus

NORFOLK & WESTERN RAILWAY COMPANY ET ALS., Defendants in Error.

rror to the Circuit Court of the United States for the Southern District of West Virginia.

gued November 27, 1905. Decided February 6, 1906.]
Before PRITCHARD, Circuit Judge, and WADDILL, District Judge.

. E. PRICE, C. W. DILLON and WM. A. GLASGOW for plaintiff in error; JOHN H. HOLT and Z. T. VINSON (BROWN, JACKSON & KNIGHT, HOLT & DUNCAN, VINSON & THOMPSON, JOS. I. DORAN, and D. E. JOHNSTON on the brief) for defendants in error.

TCHARD, Circuit Judge:

his is a petition for mandamus to the Circuit Court of United States for the Southern District of West Virginia, under the provisions of the Act of Congress of March 1899, alleging a violation of "an Act to regulate commerce," approved February 4, 1887, and Acts supplementary reto.

Upon this petition an alternative writ of mandamus was awarded and on the 6th day of June, 1905, the parties defendant appeared and a motion was made by the Railway Company, and certain other defendants to quash the alternative writ of mandamus and each paragraph thereof, which motion the court sustained. The allegations upon which the writ is asked are that the Norfolk and Western Railway Company is a common carrier, and is subject to the provisions of "An Act to regulate commerce," and the several Acts amendatory and supplemental thereto, and said Railway Company is engaged in carrying coal and coke for the plaintiff company and other coal companies in the State of West Virginia in various markets in other States. That the Norfolk & Western Railway Company agreed that the car supply furnished by it to the several shippers of coal along its line would be distributed *pro rata* to such shippers; that the Railway Company agreed that the coke ovens owned and operated by the respective coal shippers along the line of the said railway should form the basis of coal car distribution and that the car supply furnished by the said railway company between the respective coal shippers mentioned would be distributed to each shipper in the same proportion as the number of ovens owned and operated by such shipper, bore to the whole number of ovens owned and operated by all the shippers of coal from such field; that said coke ovens basis of distribution was and is equitable and fair.

That the railway company agreed with the plaintiffs in error and all the other coal companies mentioned as defendants that the car supply would be furnished upon the coke ovens basis aforesaid; that the railroad company had declined to furnish the plaintiff in error with the number of cars to which it was entitled under this basis of distribution. That the railway company has departed from such basis of distribution and has furnished to coal companies, other than the plaintiff in error, more than their fair number of cars, and the railway company thereby discriminated against the plaintiff in error and did not carry out the fair and equitable basis of distribution above set forth.

Upon the hearing, the Circuit Court held that, inasmuch as all the parties interested in the distribution of cars had

agreed upon a method of distribution according to an arbitrary basis, it could not enforce such an agreement by mandamus under the Act of March 2, 1889.

The main question presented for consideration is whether the court erred in sustaining the motion to quash the alternative writ of mandamus. Section 3, of the Interstate Commerce Act, approved February 4, 1887, in pursuance of which the petition was filed herein, is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," etc.

This Section, while comprehensive in its scope, did not afford effective means by which the provision of the Act could be carried into effect, and as a result, Congress passed a Supplemental Act on the 2d of March, 1889, Section 10 (25 St. L., 862) of which is as follows:

"That the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic or to furnish cars or other facilities for transportation for the party applying for the writ: provided, that if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to se-

curity, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact; provided, that the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement."

The purpose of this Act is to place "all shippers on an absolute equality." The sections in question were enacted with the view of preventing discrimination in all branches of freight traffic.

The language employed therein is plain, and leaves no doubt as to the true intent and meaning of Congress in the enactment of this legislation.

There is nothing in the Interstate Commerce Act, nor in the Acts supplemental thereto, which undertakes to describe any particular method of service by common carriers either in equipment and allotment of cars or the manner of movement of traffic. It leaves the carrier free to make such an arrangement with its shippers as it may deem proper, but the basis of distribution must be such as to put "all shippers on an absolute equality" and to transport traffic for each shipper "upon terms and conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper;" provided, that it does not give "undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic in any respect whatsoever, or subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable preference or disadvantage in any respect whatsoever."

It is insisted by the defendants in error that the allegations contained in the petition for the writ of mandamus do not bring this case within the purview of the statute; that the operators in the Pocahontas coal fields, by entering into an agreement with the common carrier as to the basis upon which the distribution of cars is to be made, have placed themselves in a position where the United States Court is powerless to interfere by mandamus as provided in Section 23 of the Act of March 2, 1889, to prevent the discrimination forbidden in Section 3, of the Interstate Commerce Act.

In other words, it is insisted that the agreement between the shipper and the common carrier to adopt the coke ovens' basis as the means by which to secure a proper distribution of cars among the shippers is in the nature of a contract, and that the United States Court has no power to compel the execution of a contract by mandamus. This would undoubtedly be true if the plaintiff in error relied upon a contract as the basis of its cause of action, but in this case the agreement entered into between the shippers and the carrier is not a contract in the ordinary acceptation of the term.

A mere arrangement between the Railroad Company and its patrons, relating solely to the basis upon which an equitable and fair car service could be secured, does not operate to relieve the carrier from the obligations imposed by Section 3, nor does the shipper lose the rights or remedies of Section 23 of the Act of March 2, 1889, supplemental thereto.

The agreement in question is clearly in aid of the Interstate Commerce Act, and at most is but an expression of opinion by the carrier on the one hand and the shipper on the other as to what they deem a proper basis for an equitable distribution of cars among shippers. Some such arrangement was necessary in order to enable the carrier to properly understand what would constitute a compliance with the statute on its part and at the same time to enable the shipper to ascertain and enforce his rights in accordance with Section 3, in the event he should be of opinion that the acts of the carrier were such as to amount to a discrimination against him as contemplated by the statute. It merely indicates a disposition on the part of the shipper to accept his proportionate share of the cars to be alloted by a particular method of distribution as being a substantial compliance with the statute by the carrier. To hold otherwise would be to decide that the carrier by entering into an agreement with the shipper as to the basis or means by which the distribution of cars is to be made, could thus by indirection nullify the plain provisions of the statute. The only defense which the shipper could interpose as a reason for not complying with the Act would be to show that such basis was not a reasonable or just one and that is a matter which can not be considered in the present state of the pleading, and one which the court

would not have been justified in considering in passing upon a motion to quash.

The case of *Interstate Stock Yards Co. vs. Indianapolis Union R. R. Co.*, 99 F. R., 472, bears directly on this point. In that case the Belt Line Railroad Company and the Stock Yards applied to the City of Indianapolis for assistance in the construction of a belt line around the city, and among other things it agreed as follows:

"That it would construct said railroad, together with all necessary and proper switch connections with other railroads crossed by it, and with permission to manufacturers and others to connect with it by switches and side tracks."

In pursuance of this agreement five hundred thousand dollars of the bonds of the city were given to the Belt Line Railroad Company, with the understanding that it should extend to all persons doing business on or along the line of the said railroad full facilities to connect switches with the said road, and shall carry and transport freight to and from such switches at rates per car not exceeding that charged by said company for transporting through freight of a like class and character over said road.

Although the Interstate Stock Yards Company was the owner of one of the switches connected with the belt line railroad, such road refused to transport freight for it as others similarly situated. Suit was brought in the Circuit Court of the United States to compel the transportation of freight for the Interstate Stock Yards Company on the ground that the refusal of the Belt Line Railroad Company to transport such freight was discrimination forbidden by the Interstate Commerce Act. The Belt Line Railroad Company contended that the jurisdiction of the court was limited to the enforcement of rates growing out of national legislation, and in the absence of diverse citizenship that the articles of incorporation and the ordinance conferring such were irrelevant, and should be disregarded upon the theory that, if a contract was executed, that the court could not assume jurisdiction under the Interstate Commerce Act to enforce such a contract.

In this case Judge Baker, who delivered the opinion of the court, among other things, said:

"But why is the complainant not entitled to show that its right to such switch service for interstate freight consigned

to or received by it does not rest solely upon the ground that such service is voluntarily afforded to others and denied to it? Is it any the less a discrimination, within the prohibition of the Interstate Commerce Act, that the party complaining has a legal right created by ordinance and statute to the service which is denied, than if the right to such service grew out of mutual arrangement between connecting interstate carriers? The duty in the one case grows out of contract, and in the other is created by law. But in each case the obligation to perform the duty is equally binding. Neither grows out of federal legislation, but either may be looked to in determining whether there has been a discrimination in the performance of that duty within the prohibition of the Interstate Commerce Act. The thing forbidden by the Federal statute is discrimination by a carrier engaged in whole or in part in the transportation of interstate freight and whether the existence of such discriminations depends on the duty of the carrier created by statute or on a duty growing out of contract, express or to be inferred from a common course of business, would seem to be quite immaterial. The jurisdiction of this court does not depend upon the ultimate determination of the case, but on the question whether it is made to appear by the averments of the bill of complaint that the Union Railway Company has discriminated, within the true intent of the Interstate Commerce Act, in failing to perform a legal duty owing to the complainant by refusing to deliver or to receive interstate freight, consigned to or by it on through bills of lading on its switch connected with the Belt Railroad. It seems to me that the complaint shows the existence of a duty imposed upon the Union Railway Company to deliver and receive interstate freight consigned to or by the complainant on its switch connected with the Belt Railroad. The agreement referred to in the complaint, and hereinbefore set out, leads to the same conclusion."

It matters not how petitioner's right to an equal distribution of cars may have arisen, whether by contract, statute or common law, the plaintiff in error avers that it has such legal right and that the defendant in error is discriminating against complainant. The Interstate Commerce Act clearly forbids the discrimination described in the Bill, and we are therefore of the opinion, that the court has the power under the Inter-

state Commerce Act, and the Act of March 2, 1889, supplemental thereto, to prohibit such discrimination.

A careful consideration of the statutes bearing on this subject leads us to the conclusion that to adopt any other construction would be to render the Interstate Commerce Act, in so far as it relates to discrimination, of no force, and to defeat the obvious purpose for which it was enacted

The court below erred in allowing the motion to quash the alternative writ of mandamus. We are also of the opinion that the court erred in not allowing the amendment which was offered by the plaintiff in error to the petition and the alternative writ of mandamus. The amendment should have been allowed.

The judgment of the Circuit Court is, therefore, reversed, with instructions to proceed in accordance with the views herein expressed.

Reversed.